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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 326

THE GLENN L. MARTIN NEBRASKA COMPANY, a Corporation,

Petitioner,

vs.

WREN L. CULKIN, GLEN WEST, FRANCIS H. MASKER, and ALEX FEILMEYER, Individually and as Agents and Representatives to Maintain This Action for and in Behalf of All Employees Similarly Situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

J. A. C. KENNEDY, Omaha, Nebraska,
GEORGE L. DELACY, Omaha, Nebraska,
LEO EISENSTATT, Omaha, Nebraska,
DONALD LEACH, Columbus, Ohio,
KENNEDY, HOLLAND, DELACY & SVOBODA,
Omaha, Nebraska,
Attorneys for Petitioner.

Law Briefs — OMAHA LINO-SLUG PRINTING CO. — 418 So. 13th St.

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No. ———

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WREN L. CULKIN, GLEN WEST, FRANCIS H. MASKER, and ALEX FEILMEYER, Individually and as Agents and Representatives to Maintain This Action for and in Behalf of All Employees Similarly Situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable the Chief Justice and the Associate Justices of the United States:

Your Petitioner, The Glenn L. Martin Nebraska Company, a corporation, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Eighth Circuit rendered on the 24th day of June, 1952, which by a divided Court affirmed a

judgment of the United States District Court for the District of Nebraska, Omaha Division, finding in favor of the Appellees, and in entering judgment in favor of the Appellees in the total sum of $60,980.14, constituting unpaid wages and overtime found to be due Appellees from Appellant under the Fair Labor Standards Act, as amended, together with liquidated damages in the sum of $30,490.07, or a total of $91,470.21, together with the allowance of an attorney's fee in the sum of $15,000.00, all to draw interest at 6% from the 17th day of July, 1951. Appellant's Petition for Rehearing filed in Court of Appeals was denied August 15, 1952.

JURISDICTION

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U. S. C. 1254 (1). The opinion of the Court of Appeals for the Eighth Circuit was filed June 24, 1952. Petition for Rehearing was overruled August 15, 1952. Upon application of the Appellant an order was entered staying the issuance of the mandate until the 21st day of September, 1952, pending the filing of this Petition for Certiorari.

OPINIONS BELOW

The opinion of the District Court is reported in 97 Fed. Supp. 661, and is also printed in the Record (R. 54 to 72). The majority opinion of the Court of Appeals and the dissenting opinion of Judge Riddick appears in — Fed. (2d) —, and also printed in the Record (R. 5).

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Respondents, *Wren L. Culkin, Glen West, Francis H. Masker* and *Alex Feilmeyer*, individually and as agents

and representatives to maintain an action for and on behalf of all employees similarly situated, instituted this action against your Petitioner for the recovery of alleged unpaid overtime compensation and liquidated damages, and, in addition thereto, attorney's fees and costs under Section 16(b) of the Fair Labor Standards Act of 1938 (29 U. S. C. 216 (b)).

The Respondents, and the 254 employees represented by Respondents, were employed as guards or firemen at the Petitioner's plant. The Petitioner operated The Glenn L. Martin Nebraska Company plant near Omaha, Nebraska, during World War II. The United States Government erected an airplane assembly and modification plant on a military reservation, known as Fort Crook, Nebraska, some miles out from Omaha, Nebraska. The plant covered some 700 acres and was fenced and guarded. The Government entered into contracts with The Glenn L. Martin Nebraska Company for the modification of and the production of airplanes. To carry out these contracts, some 13,000 or 14,000 persons were employed at the plant.

The plant operated on a 24-hour a day schedule. Until March 6, 1943, the guards and firemen worked on three shifts. The first shift checked in not later than seven and checked out not earlier than three p. m The other two shifts covered the remainder of the time. *The guards were required to eat their lunch at their posts, and were not allowed to leave their posts.*

The Petitioner had constructed in the various buildings on the plant area four or five very excellent cafeterias.

On March 3, 1943, an order was issued by Petitioner, effective March 6, 1943, which was as follows:

> "Effective Saturday, March 6, the Guards on the first shift will ring in by 6:45 A. M. and ring out after 3:15 P. M. This will mean that the Guards will have 8½ hours on the clock. This should be ample time to get your uniforms changed and receive orders and be on the post at 7:00 A. M.
>
> "Guards will not be allowed to eat on their posts. They will be allowed thirty (30) minutes for lunch. The Rover in this case when on relief will check the Guard out and in during the lunch period. The Guards will be allowed to eat in the Cafeteria during the lunch period.
>
> "The Guards on the second shift will ring in by 2:45 P. M. and ring out after 11:15 P. M. and will follow the instructions as given in the first paragraph, and the second paragraph.
>
> "The Guards on the third shift will ring in by 10:45 P. M. and ring out after 7:15 A. M. and will follow the instructions as given in the first paragraph, and the second paragraph.
>
> "That pertains to all three Companies."

The guards on the first shift, while they rang in at 6:45, did not have to be at their post until seven, and while they rang out at three fifteen, they did not have to be at their post later than three. They were paid for eight hours. The other shifts were arranged accordingly.

The Timekeeping Department was directed to, and did deduct, the thirty minute lunch period from working time. The Lower Court found as a finding of fact that the employees knew that they were not to be paid for the thirty minute lunch period.

The undisputed evidence shows that in accordance with the bulletin of March 6th, your Petitioner each morning posted *bulletins assigning the various guards to the various posts, assigning their lunch period and setting forth by whom they were to be relieved.* Some of the posts could not be left vacant, so rovers or relief men were provided to relieve the guards at these posts.

The undisputed evidence shows that this was done. If the guards were at a distant post, rovers in jeeps or on bicycles relieved them, and the guard took the jeep or the bicycle and rode to the cafeteria and back.

At some of the posts there were several guards stationed and these guards relieved each other for their lunch periods; if they were close enough to the cafeteria, they walked to it. If not, they were transported to the cafeterias in company jeeps.

The undisputed evidence shows that this plan was put in effect; that the daily bulletins were posted assigning the guards and firemen to their posts, assigning the lunch hours of the guards, and listing in the bulletin by whom they would be relieved.

The Petitioner maintained, as has been said before, large and excellent cafeterias, and these guards could either eat at the cafeteria or could go to their locker rooms or could be at ease or could go to what is called the smoking area.

An attempt was made to show that during the lunch period, on one or two occasions in some eighteen months, one or two of the guards were called away from lunch or their lunch was interrupted. On cross-examination it de-

veloped that only two or three of the guards were called away from any lunch period, during the period from March 6, 1943, to September 17, 1944 (the period involved), and if they were, they were allowed to return and have their lunch at a later period.

The undisputed evidence likewise shows that not any guard was called away more than two or three times, or a few times during the period from March 6, 1943, to September 17, 1944. At this latter date, another bulletin was posted, which changed the hours of the guards and firemen again, and which required the guards and firemen to eat their lunch at their posts and deprived them of the right of eating in the cafeteria. Not more than twelve guards and firemen were called to testify. These testified generally. They, however, did not pretend to give evidence of the actual time consumed by their activities during any lunch period, nor did they presume to give any evidence as to the actual activities of the approximately 250 claimants who did not appear.

We believe that Circuit Judge Riddick's statement of the matter involved is so accurate and to the point, that we will quote it from the dissenting opinion:

> "Plaintiffs were employed as guards or firemen at defendant's plant. Their employment was subject to the approval of the United States. They were required to bear arms and wear identifying uniforms furnished them while within the plant.
>
> "From January 1, 1942, until March 6, 1943, plaintiffs were employed and paid for an eight-hour day. During this period plaintiffs were required to spend one-half hour or more each day, in addition to their regular eight-hour work day, in reporting for duty, answering roll call, changing from their civilian

clothes to their uniforms, and in receiving arms and other equipment before reporting to their posts of duty, and at the conclusion of their eight-hour work day in changing from their uniforms to their civilian clothes and turning in their equipment. For this time in excess of their eight hours of work they were not paid, and payment was not required either by an express provision of their contract of employment or by any custom or practice existing at defendant's plant. During this period plaintiffs were allowed no time off for lunch. They were permitted to bring their lunches and eat while at their posts of duty as and when their work permitted.

"After March 6, 1943, and until September 17, 1944, the work hours of plaintiffs were changed. What brought about the change the evidence does not reveal, but under it the plaintiffs were still employed for an eight-hour work day which began fifteen minutes before they reached the posts to which they were assigned and ended fifteen minutes after leaving their posts. For this half hour which plaintiffs spent in reporting for duty, in changing from civilian to official clothes, and in receiving equipment before going to their posts and in changing from official to civilian clothes and turning in equipment after leaving their posts, the plaintiffs were paid. But during this period plaintiffs were allowed thirty minutes off each day for lunch for which they received no compensation and for which no express provision of their contract of employment or any custom or practice existing at defendant's plant required payment. During the thirty minutes allowed for lunch plaintiffs were permitted to eat at defendant's cafeterias, or, if they preferred, to bring their own lunches and to eat wherever they wished during the lunch period allowed them.

"Beginning on September 17, 1944, the hours of work for plaintiffs were again changed. From the date mentioned until the termination of operations at defendant's plant the thirty minutes allowance of time

off for lunch was abolished and plaintiffs were paid for eight and one-half hours each day. During this period plaintiffs were required, if they ate lunch, to bring it with them and eat at their posts of duty.

"The first complaint in this action was filed on January 11, 1945, by four plaintiffs on behalf of themselves and as representatives of 109 similarly-situated employees. On March 2, 1945, the same plaintiffs filed an amendment to the complaint on behalf of 117 additional similarly-situated employees. And on November 5, 1946, the second amended complaint added 48 employees. The claim stated in these complaints was for the recovery of alleged unpaid overtime compensation and liquidated damages and, in addition, attorney's fees and costs. Each of these complaints charged that plaintiffs were employed by defendant in three separate shifts of eight hours each until September 1944, and thereafter in three shifts of eight and one-half hours each, for which they were paid. Unpaid overtime compensation was claimed throughout the period of employment for time occupied by plaintiffs in reporting for duty, changing uniforms, and receiving equipment before the beginning of their respective shifts, and in changing from uniforms to civilian clothes and turning in equipment at the conclusion of their respective shifts; and for the thirty minutes each day allowed for lunch in the period beginning March 6, 1943, and ending September 16, 1944.

"The Portal-to-Portal Act of 1947 became effective May 14, 1947. On June 7, 1947, the defendant moved to dismiss the action 'for the reason that the jurisdiction of the alleged cause of action * * * is divested this Court by Section 2(d) of the Portal-to-Portal Act of 1947, for the reason that the activities set forth in the Complaint and Amendments thereof filed herein are not compensable activities as defined in Sections 2(a) and (b) of the Portal-to-Portal Act of 1947.'

"In response to this motion plaintiffs filed a supplemental pleading changing their claim for relief. In this pleading they alleged that they were employed for a work day of eight and one-half hours instead of eight hours throughout the time of their employment. They denied that they claimed 'or ever have claimed' payment for the time spent by them immediately prior to or immediately subsequent to the eight and one-half hour shift; that throughout the entire period of employment plaintiffs were entitled to compensation for the entire period of eight and one-half hours 'under the universal custom and practice in effect at said time, and for many years prior thereto * * *' and 'under the general non-written contract of employment in effect between Defendant and each of said employees.' The prayer of this pleading was that the motion to dismiss be denied and that plaintiffs have judgment 'as prayed in their said original Complaint and First and Second Amendments thereto.'

"The District Court reserved decision on the motion to dismiss until the trial on the merits, and granted defendant time in which to plead further. In its answer defendant denied the material allegations of plaintiffs' various pleadings, set up numerous defenses no longer important in the case because abandoned by defendant or overruled by decisions of the Supreme Court before the case came to trial, and repeated by way of defense the provisions of the Portal-to-Portal Act of 1947 relied on in its motion to dismiss.

"Both parties amended their pleadings by leave of court during the course of the trial. Plaintiffs' amendment alleged:

" 'That it was the custom and practice generally of the above named defendant at the premises of said defendant aforesaid and where each and all of

said plaintiffs were employed throughout the entire period involved in this action and particularly throughout the years 1943 and 1944, to pay its employees on the basis of time and one-half for all hours of actual working time of each such employee in excess of 40 hours in any one work week; and that all such actual working time was compensable under said custom and practice. That, however, defendant particularly throughout the period of March 6, 1943, to September 16, 1944, wrongfully declined and refused to consider the activities of these plaintiffs during their alleged one-half hour lunch period as being actual working time. * * *"

"Defendant's amendments to its pleadings alleged as true the facts set out at the beginning of this opinion, denied the existence of a contract, written or non-written, or a practice or custom requiring payments to plaintiffs other than those made, and alleged that its conduct in not paying the plaintiffs compensation for the thirty-minute lunch period between March 6, 1943, and September 17, 1944, or for any activities performed during said period was in good faith, and that the defendant had reasonable grounds for belief that its omission so to do was not in violation of the Fair Labor Standards Act of 1938, as amended.

"At the beginning of the trial plaintiffs abandoned all claims for unpaid compensation except for the thirty-minute lunch period allowed them between March 6, 1943, and September 17, 1944. The real question at issue was whether the thirty-minute lunch period was compensable working time in view of the provisions of the Portal-to-Portal Act of 1947 relied on by the defendant. On this issue the court found that the thirty-minute period was not compensable by an express provision of the contract of employment, and that the allegations of a practice or custom for compensation for this period in plaintiffs' pleadings were insufficient to raise the issue. The trial

Court also found that the defendant adopted the arrangement for a thirty-minute lunch period in good faith and with reasonable grounds for belief that it was not in violation of the Fair Labor Standards Act, as amended. But the trial court concluded that although the lunch period was not compensable working time by contract or custom or practice, it was, nevertheless, compensable working time because plaintiffs during the thirty-minute period were subject to call to active duty in case of emergency, and because during the lunch period plaintiffs were required to wear their uniforms including their caps, and to bear their sidearms or portable telephone as required while on active duty.

* * *

"The evidence on which the court reached the conclusion stated in its opinion came from only twelve of the more than 250 plaintiffs. None who testified could remember a specific instance of a call to active duty during his lunch period. All admitted that unless called to duty they had an uninterrupted thirty minutes for lunch. All admitted that if the lunch period was temporarily interrupted by a call to duty the employee could return to lunch at a later period. Only one witness testified that he was always on duty throughout the lunch period. His testimony was contradicted by the evidence on behalf of the defendant supported by defendant's timekeeping records."

The original action was not a true class action, but a consolidation for trial of more than 254 separate claims. The action was not one to recover for time spent on calls to duty during an alleged lunch period. The claims were for compensation for the entire lunch period even though the claimants spent their entire lunch time eating their lunch in the cafeteria, or in the locker room at ease, or in the smoking area at ease. The case was brought on be-

half of approximately 250 claimants by four plaintiffs. The Judgment entered appears on page 78 of the printed Record and in a flat judgment in favor of the four plaintiffs for $60,980.14 plus $30,490.07 liquidated damages, or a total of $91,470.21. This sum the Court found due the individual employee plaintiffs in the respective sums set opposite their names in the detailed list attached to the Judgment.

The Lower Court also allowed the plaintiffs' attorney $15,000.00. The Judgment was affirmed by the United States Court of Appeals by a two to one decision. The Judges Johnsen and Collet were for an affirmance, and Judge Riddick dissented, and filed a dissenting opinion. The majority were of the opinion that the case was controlled by the opinion in *Central Missouri Telephone Company, Eighth Circuit,* 170 Fed. (2d) 641.

The Court of Appeals affirmed the decision of the Lower Court to the effect that Section 2 of the Portal-to-Portal Act was not applicable, and held that the plaintiffs were not required to plead a contract or a custom in order to recover for the entire thirty minute lunch period involved between March 6, 1943, and September 17, 1944.

QUESTIONS PRESENTED

The questions presented by this Petition are—

1. Whether in a suit, under Section 16 of the Fair Labor Standards Act of 1938, as amended, brought by four employees on behalf of themselves and on behalf of some 250 other employees, i. e., guards and a few firemen employed at The Glenn L. Martin Nebraska Plant engaged in manufacturing and modifying of airplanes for the United States Government during the last war, to re-

cover overtime for the thirty minute lunch period which was allowed them and provided for them, and in which period the guards were allowed to go to the cafeteria to eat or were allowed to go to the locker room or the smoking area, and concerning which it was understood and known by everybody that said employees were not to be paid for the lunch period, can recover compensation and overtime for the lunch period *without alleging and showing that within the meaning of Section 2 of the Portal-to-Portal Act*, 29 U. S. C. A., Sections 251 to 262, *there was either a contract or a custom to pay for such period.*

2. Whether the holding as a matter of law by the District Court and the Court of Appeals for the Eighth Circuit that because the activities involved claimed to have taken place during the allowed thirty minute lunch period were not strictly speaking preliminary or postliminary activities, that Section 2 of the Portal-to-Portal Act of 1947 does not apply, the case being brought for overtime compensation and liquidated damages, under Section 16 of the Fair Labor Standards Act of 1938, as amended.

3. Whether the facts in *Central Missouri Telephone Company vs. Conwell*, Eighth Circuit, 170 Fed. (2d) 641, make this case decisive as an authority in the case at bar.

4. Whether the decision in *Central Missouri Telephone Company vs. Conwell*, Eighth Circuit, 170 Fed. (2d) 641, is correct or should be overruled.

5. Whether in a case where guards and firemen were specifically allowed a thirty minute lunch period and where there was a bulletin published to that effect and where the Company each morning posted a bulletin desig-

nating the various posts to which the guards were assigned, designating their lunch periods, and designating by whom they were to be relieved, and when the undisputed evidence shows that they were relieved and were allowed to go to the cafeteria during their lunch period and were allowed to go to the smoking area, or to their locker room, and where, in addition thereto, the evidence shows that guards at certain posts were relieved by rovers, and where the evidence shows that guards at distant posts were brought to the cafeterias by jeeps and where it is admitted by all that all of the claimants knew of the bulletin, knew of the plan, and knew that they were not to be paid for the thirty minute lunch period provided for by the Petitioner—whether in such case such guards and firemen bringing a suit after the close of the war, and after the close of the Plant to recover overtime for the thirty minute period involved because of the fact that during the lunch period they wore their uniforms and because of the fact that they were not allowed to leave the area, which was over 700 acres in extent, could maintain such a suit under Section 16 of the Fair Labor Standards Act of 1938, as amended, without proving any contract or custom, to pay for such period as required by Section 2 of the Portal-to-Portal Act.

6. Whether the claimed activities on the part of the guards or firemen during their thirty minute lunch period came within the meaning of the term "*any activity of an employee engaged in prior to the date of the enactment of this Act*" so as to require either an express contract or custom, as required by subsections 1 or 2 of subsection (a), Section 2, Part II, of the Portal-to-Portal Act of 1947.

7. Whether the District Court had jurisdiction in view of Section (d), Section 2, Part II of the Portal-to-Portal Act of 1947, which provides—

> "No court of the United States, * * * shall have jurisdiction in any action or proceeding, whether instituted prior to or on or after the date of the enactment of this act, to enforce liability * * * on account of the failure of the employer to pay minimum wages on overtime compensation under Fair Labor Standards Act of 1938 as amended * * *, to the extent that such proceeding seeks to enforce any liability * * * with respect to *an* activity which was not compensable within the meaning of sub-sections (a) and (b)" (contract to pay or custom).

8. Whether the holding of the District Court affirmed by Court of Appeals to the effect,—that although the lunch period was not compensable working time by contract or practice, it was nevertheless, compensable working time because plaintiffs during the thirty-minute period were subject to call to active duty in case of emergency and because during the lunch periods plaintiffs were required to wear uniforms, including their caps and to bear their sidearms,—*was not clearly erroneous.*

9. Whether Section 2 of Part II of the Portal-to-Portal Act of 1947, which requires either a contract or custom, is applicable to all activities prior to the passage of the Act, and determines the compensability of all activities during an employee's day rather than being limited to preliminary and postliminary activities.

10. Whether the true rule is that Section 2 of Part II of the Portal-to-Portal Act of 1947 applies to *all* activities, not simply preliminary or postliminary activities, sought to be made the basis of a claim under paragraph

16 of the Fair Labor Standards Act of 1938, as amended, as held in *Seese v. Bethlehem Steel Company,* 4th Cir., 74 Fed. Supp. 412, affirmed 168 Fed. (2d) 58; *Kemp v. Day & Zimmerman,* Supreme Court of Iowa, 33 N. W. (2d) 569; *Battaglia vs. General Motors Corporation,* 169 Fed. (2d) 254, 2d Cir.; *Bauler v. Pressed Steel Car Company,* 81 Fed. Supp. 172, affirmed 7th Cir., 182 Fed. (2d) 357; *Boerkoel v. Hayes Manufacturing Company,* 76 Fed. Supp. 771 (D. C. Western District of Michigan); *Love v. United States Rubber Company* (U. S. D. C., Pa.), 92 Fed. Supp. 174; *Welsh v. Dillner Transfer Company* (D. C., Western Dist. of Pa.), 91 Fed. Supp. 685. This last mentioned case holds weight of authority contra to *Central Missouri Telephone Company v. Conwell,* 8th Cir., 170 Fed. (2d) 641.

11. Whether or not the following finding of fact of the Lower Court, affirmed by the Court of Appeals, was clearly erroneous.

> "The evidence clearly establishes as a matter of fact that during the 'lunch periods' in question, the employees were engaged in the principal activity of the work week and were not merely taking care of preliminary or postliminary matters." (Record, page 72.)

12. Whether the holding of the Court of Appeals to the effect that the "de minimus" rule did not apply was correct.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred as follows:

1. In affirming the decision of the Lower Court which held that although the case was one for overtime compen-

sation under Section 16 of the Fair Labor Standards Act of 1938, as amended, plaintiffs were not required to plead or prove a contract or custom to pay for claimed activities during a designated lunch period as required by paragraphs (1) and (2) of sub-section (a) of Section 2 of Part II of the Portal-to-Portal Act of 1947, 29 U. S. C. A., Sections 251 to 262, and in so holding in its opinion.

2. In allowing plaintiffs in a suit under Section 16 of the Fair Labor Standards Act of 1938, as amended, to recover compensation and overtime compensation for alleged activities claimed to have been performed prior to the passage of the Portal-to-Portal Act of 1947 during thirty minute lunch periods allowed claimants, where the undisputed evidence and findings of the Lower Court disclosed no contract or custom to pay for such activities as required by Section 2 of Part II of the Portal-to-Portal Act of 1947.

3. The Court of Appeals erred in sustaining the decision of the District Court to the effect that Section 2 of Part II of the Portal-to-Portal Act of 1947 was not applicable, and that plaintiffs were not required to prove a contract or custom as required by said Portal-to-Portal Act, i. e., paragraphs (1) and (2), sub-section (a) of Section 2 of Part II of said Act.

4. Under the same facts as set forth in Assignment of Error 2, the Court of Appeals erred in affirming the decision of the Lower Court to the effect that the Court had jurisdiction to try said case and to enter judgment for plaintiffs, notwithstanding sub-section (d) of Section 2 of Part II of the Portal-to-Portal Act of 1947.

5. The Lower Court erred and the Court of Appeals erred in affirming the holding that applicability of paragraphs (1) and (2) of sub-section (a) of Section 2 of Part II of the Portal-to-Portal Act of 1947 depended upon the nature of activities involved and that said sections only applied where activities were, strictly speaking, of a preliminary or postliminary character.

6. The Court of Appeals erred in holding and in affirming decision of Lower Court which so held that the case of *Central Missouri Telephone Company vs. Conwell,* 170 Fed. (2d) 641, was decisive of the case at bar.

7. The Court of Appeals erred in holding and in affirming decision of Lower Court which held that the rule laid down in *Central Missouri Telephone Company v. Conwell,* 170 F. (2d) 641, was the correct law and in not following the majority view of the country, which is to the contrary.

8. Where undisputed evidence shows that guards were required to do certain specified work at their posts, such as inspecting cars, checking freight cars, checking identification of persons entering the Plant, and where evidence shows guards were allowed after March 6, 1943, until September 17, 1947, a thirty minute lunch period without pay and were assigned by daily bulletin to their respective posts, and were assigned by the same bulletin their exact lunch periods and by whom they were to be relieved when necessary by guards or rovers, and where some of them were transported to cafeterias in jeeps or allowed to use bicycles to go to cafeterias, said guards being relieved by rovers, a finding that said guards were engaged in their regular activities because while eating in the cafeterias or at ease in the smoking area, they were

required to remain within the 700 acre plant area and were required to wear their uniform and guns, or because they might be called in case of an emergency, or because during the period of the eighteen months involved on one or two occasions the lunch period of a few guards was disturbed, they being allowed to eat their lunch at a later period, is clearly erroneous, and the Court of Appeals erred in affirming the decision of the Lower Court, which so held.

9. Where the undisputed evidence shows the firemen involved during the period involved were by bulletin in the morning assigned to various stations, i. e., inspection in the various buildings or crash truck, and where three or four of them were assigned to the fire house and where the undisputed evidence shows that the firemen inspecting in the various buildings were allowed a thirty minute lunch period, and were allowed to eat in the cafeterias, and where the undisputed evidence shows that the firemen who remained in the fire hall were allowed a thirty minute lunch period and were allowed to go to the cafeteria, and get their lunch, and were allowed to eat it at a table provided for that purpose in the fire hall, and where the evidence discloses that if their lunch period was ever disturbed they were allowed a lunch period at another time, and where the evidence shows that there was a cafeteria within a few steps of the fire hall, the finding of the Lower Court affirmed by the Court of Appeals to the effect that during this allowed lunch period the firemen were performing their regular activities, is clearly erroneous.

10. The Court of Appeals erred in affirming the following finding of the Lower Court:

> "the evidence clearly establishes as a matter of fact that during the 'lunch periods' in question, the employees were engaged in the principal activity of the work week and were not merely taking care of preliminary or postliminary matters."

and in finding that the thirty minute lunch period constituted hours worked within the meaning of the Fair Labor Standards Act, was clearly erroneous as to 1) guards; 2) firemen.

11. The Court of Appeals erred in deciding as a matter of law that Section 2 of Part II of the Portal-to-Portal Act did not apply, holding this as to 1) guards; 2) firemen.

12. The Court of Appeals erred in affirming the allowance of liquidated damages by the Lower Court.

13. The Court of Appeals erred in affirming the judgment of the District Court in—

(a) Allowing judgment in favor of plaintiffs in the sum of $60,980.14;

(b) Allowing liquidated damages in favor of plaintiffs in the sum of $30,490.07;

(c) Allowing plaintiffs' attorney $15,000.00 as attorney fees.

14. The Court of Appeals erred in holding that the de minimis principle did not apply.

STATUTE INVOLVED

The statute involved is known as the Portal-to-Portal Act, and is Section 29-251 through Section 262, Title 29, United States Code Annotated.

The pertinent sections will be set out in an Appendix attached hereto.

REASONS RELIED ON FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is in conflict with the decision of other Courts of Appeals on the questions set out in Questions Presented, numbered as follows: 1, 2, 5, 6, 7, 9, 10.

2. The Court below decided important questions of Federal law in interpretation of Fair Labor Standards Act of 1938 as effected by Portal-to-Portal Act of 1947, which have not been but should be settled by this Court.

3. The Court of Appeals decided a Federal question of law in conflict with the applicable decisions of this Court.

4. The Court below affirmed a finding of fact of the Lower Court to the effect that during the lunch periods involved the guards were engaged in the principal activity of the work-week and were not merely taking care of preliminary or postliminary matters, which said finding of fact was clearly erroneous.

5. The Court below affirmed a finding of fact of the Lower Court to the effect that during the lunch periods involved the firemen were engaged in the principal activity of the work-week and were not merely taking care of preliminary or postliminary matters, which said finding of fact was clearly erroneous.

6. Under the evidence the Court of Appeals should have held that the District Court erred in not applying the rule of "De Minimus Non Curat Lex."

Note: Argument in support of the foregoing Reasons Relied on for Granting the Writ and in support of the Specification of Errors set forth herein will be presented in a Brief hereto attached.

It is respectfully submitted that there is here presented a proper case for the exercise of the supervisory power of this Court.

Jack Kennedy
George L. O'Hara
Leo Ernst
Don Leach

Counsel for Petitioner

Date: 9/3/52

APPENDIX

Portal-to-Portal Act of 1947, 29 United States Code Annotated, Sections 251 Through 262

Section 251—Congressional Findings and Declaration of Policy:

We will not quote this.

Section 252—Relief from certain existing claims under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act:

This we will quote down to sub-section (e), which is not pertinent.

"(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after May 14, 1947), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to May 14, 1947, except an activity which was compensable by either—

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

"(b) For the purpose of subsection (a) of this section, an activity shall be considered as compen-

sable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

"(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

"(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after May 14, 1947, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healy Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section."

Section 253—Compromise of certain existing claims under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act:

This is not set out.

Section 254—Relief from certain future claims under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act:

"(a) Except as provided in subsection (b), no employer shall be subject to any liability or punish-

ment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—

"(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

"(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

"(b) Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

"(c) For the purposes of subsection (b) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion

of the day with respect to which it is so made compensable.

"(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section."

Section 255—Statute of Limitations:

This is not quoted.

Section 256—Determination of commencement of future actions:

This is not quoted.

Section 257—Pending collective and representative actions:

"The statute of limitations prescribed in section 255(b) of this title shall also be applicable (in the case of a collective or representative action commenced prior to May 14, 1947, under the Fair Labor Standards Act of 1938, as amended) to an individual claimant who has not been specifically named as a party plaintiff to the action prior to the expiration of one hundred and twenty days after May 14, 1947. In the application of such statute of limitations such action shall be considered to have been commenced as to him when, and only when, his written consent to become a party plaintiff to the action is filed in the court in which the action was brought."

Section 258—Reliance on past administrative rulings, etc.

This is not quoted.

Section 259—Reliance in future on administrative Rulings, etc.:

This is not quoted.

Section 260—Liquidated damages:

"In any action commenced prior to or on or after May 14, 1947, to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the Court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in Section 216 (b) of this title."

Section 261—Applicability of 'area of production' regulations:

This is not quoted.

Section 262—Definitions:

This is not quoted.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. ———

THE GLENN L. MARTIN NEBRASKA COMPANY, a Corporation,

Petitioner,

vs.

WREN L. CULKIN, GLEN WEST, FRANCIS H. MASKER, and ALEX FEILMEYER, Individually and as Agents and Representatives to Maintain This Action for and in Behalf of All Employees Similarly Situated,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Reason Number 1 Relied Upon for Granting Writ of Certiorari:

The Decision of the Court of Appeals Is in Conflict with the Decision of Other Courts of Appeals on the Questions Set Out in Questions Presented, Numbered as Follows: 1, 2, 5, 6, 7, 9 and 10 Included in Petition for Writ of Certiorari.

The Court of Appeals affirmed the Lower Court's decision which held—

> "whether the time is Portal-to-Portal time depends on the nature of the activity engaged in during the period in question and not upon the term by which the period is known. * * * The evidence in this case clearly establishes as a matter of fact that during the lunch periods in question, the employees were engaged in the principal activity of the workweek and were not merely taking care of preliminary or postliminary matters. This being so, the court has concluded that Section 2 of the Portal Act is inapplicable to this case and that the plaintiffs are not required to plead and prove a contract, custom or practice to compensate them for the hours worked during the lunch period."

The Court of Appeals likewise held that the case falls within the class with the *Central Missouri Telephone Company* case, 170 Fed. (2d) 641, and held that the Portal-to-Portal Act did not apply to the case.

We refer to the Summary and Short Statement of the Matter Involved, and we especially refer to the dissenting opinion of Judge Riddick.

The plaintiffs were allowed a thirty minute lunch period. All but a few of the plaintiffs were guards. Guards and Firemen are identified by the letters "G" and "F" in the list attached to the Judgment. There were only a few firemen, relatively speaking.

The undisputed evidence shows that the defendant, by bulletin, granted to the guards a thirty minute lunch period without pay, granting them the right to go to and eat in the cafeterias, and the defendant provided the necessary reliefs in order to enable the guards to go to

the cafeterias. They could either go to the cafeterias or to a smoking area, or to rest rooms. It is claimed that because the guards wore their uniforms and equipment and because they were not allowed to leave the plant area, which was more than 700 acres, that they should have been paid for this lunch period notwithstanding that they knew they were not to be paid for it, and notwithstanding that they were allowed a lunch period. There never was but one emergency, but the claim was made that the guards were subject to be called in the event there was an emergency, and an attempt was made to prove that their lunch periods were on occasions interrupted. However, the proof fell down in this respect. The proof in this regard is as set forth in Judge Riddick's opinion. Only on the rarest occasions, i. e., one or two times in eighteen months was the lunch period of the guards or any of them disturbed, and if the lunch periods were disturbed, they were allowed to eat their lunch at a later time. No attempt was made to prove any actual time consumed during this thirty minute period by guards or firemen. Only twelve witnesses were called. There was no testimony except general testimony as to the activities of the other 242 claimants. The case was submitted on the testimony of these 12 claimants. The Lower Court ordered judgment in favor of all the plaintiffs, i. e., 254 in number,—this on the general testimony indicated above.

The Lower Court found that there was no contract to pay the employees for this lunch period. In passing it should be noted that none of the other 10,000 or 12,000 employees were paid for their lunch periods. The Court did not find that there was any custom or practice to pay them within the meaning of the Portal-to-Portal Act, but the Lower Court and the Court of Appeals were of

the opinion that unless an activity was preliminary or postliminary in character, it did not come within the meaning of sub-section (a), Section 2, Part II, of the Portal-to-Portal Act of 1947. This Act was passed after the Fair Labor Standards Act, and, in effect, was an amendment to the earlier Act—both Acts the Court has held must be construed together.

The undisputed evidence shows that guards had specific duties at their various posts, checking cars, trucks, trains, and identifying persons, and so forth. When they went to lunch they left their post, went to a cafeteria, and ate their lunch, and were allowed thirty minutes. Surely no employers having allowed a thirty minute lunch period to his employees would anticipate or expect that several years after the close of his enterprise he would be sued in Court, and be compelled to pay time and a half for these lunch periods.

There were some five cafeterias. All of the employees, machinists, and so forth, were allowed a thirty minute lunch period, and were not paid for it. The Lower Court, however, and the Court of Appeals held that the Portal-to-Portal Act did not apply because of the fact that the activities were not preliminary or postliminary in character.

The Eighth Circuit itself had used these words in discussing a claim for lunch period in the case of *United States Cartridge Company v. Powell,* 185 Fed. (2d) 67. In that case, which was brought under the Fair Labor Standards Act, the Court of Appeals used this language—

> "Since the time claimed before the beginning of the regular shifts and the 30 minute lunch periods

are of the character which the Portal-to-Portal Act requires that there should be a contract expressly providing compensation for, or a custom or practice consistent with an intention that there be compensation for such time, and not inconsistent with an existing contract, before compensation may be recovered for such time, a formal compliance with the Act would require that the conditions precedent to recovery specified in the Act, be pleaded."

The opinion of the Court in the case at bar is now to the effect that in a suit brought under Section 16 of the Fair Labor Standards Act to recover for compensation under that Act, the Portal-to-Portal Act of 1947 does not apply, unless the activities were preliminary or postliminary in character, and the Court has held that for claimed activities during lunch period which were, according to the opinion, more or less standby activities, a recovery could be had under the Fair Labor Standards Act, and that the Portal-to-Portal Act does not apply even though the activities were prior to the passage of the Portal-to-Portal Act in May, 1947.

We believe the weight of authority in the country is to the contrary; other circuits have held to the contrary and we further believe that this Court has never specifically passed upon the matter.

We cite in support of this contention the following cases:

Battaglia, et al., v. General Motors Corp. (C. C. A. 2d Cir.), 169 Fed. (2d) 254. Suits were brought in the District Court for the Western District of New York by and in behalf of the defendant's employees to recover overtime pay in accordance with the provisions of the

Fair Labor Standards Act of 1938. While these suits were pending without adjudication, Congress enacted the Portal-to-Portal Act of 1947 (29 U. S. C. A. 251-262). The Lower Court entered an order sustaining defendant's Motion to Dismiss the Complaint. *One of the basis for the claim was time spent in lunch periods and rest periods during which their time was not entirely at the disposal of the employees.* The Court said it was not alleged that the compensation sought was for activities which were compensable by an express provision of a written or non-written contract or by a custom or practice in effect at the time of activities or at the place of employment. Consequently, the appellants did not meet the condition of sub-section (a) of Section 2 of Part II of the Portal-to-Portal Act on showing the employer's liability under the Fair Labor Standards Act, nor did they comply with the jurisdictional requirements of sub-division (d) of that Section of the Act.

In this case it will be noted that a recovery was sought under the Fair Labor Standards Act on account of activities claimed to have been performed during the lunch period, and during the rest periods. The Court squarely held that to recover under such Act for such activities during the periods involved it was necessary to plead a contract or custom within the meaning of sub-section (a) of Section 2 of Part II of the Portal-to-Portal Act of 1947.

The case of *Boerkoel v. Hayes Manufacturing Company,* District Court, Western Division, Michigan, 76 Fed. Supp. 771, involved a suit to recover unpaid overtime compensation and liquidated damages and attorney fees under Section 16 of the Fair Labor Standards Act of

1938. The defendant's Motion to Dismiss was sustained, this because there was no pleading of a contract or custom within the meaning of Section 2 of the Portal-to-Portal Act of 1947. The Court in the opinion says:

> "Plaintiff contends that section 2 of the Portal-to-Portal Act is not applicable because his suit is not based on strictly portal-to-portal activities, that is, activities preliminary or postliminary to his principal activities. However, this contention ignores the plain wording of that section, which covers all activities and claims arising prior to the passage of the Act and determines the compensability of all activities during an employee's day. It should be noted that section 4 of the Act deals only with future claims for so-called portal-to-portal activities. In determining that section 2 of the Act is not limited to strictly portal-to-portal activities, the court said in Seese v. Bethlehem Steel Co., supra, 74 F. Supp. 416:
>
> "'When we look at the wording and structure of the Portal Act we find that it was clearly intended to define what activities claimed to create a liability for overtime work were made compensable. Thus the language reads—(see Section 2 (a) hereinbefore quoted). * * * It will be noted that the act in this respect is not limited to portal-to-portal activities as such but defines the essential characteristics of any alleged liability for nonpayment of minimum wages or overtime compensation. None are to be compensable "except an activity which was compensable by either—" contract, custom or practice. Furthermore, while the language includes the word "except," it seems entirely clear from the whole wording that the exception is the only activity which is compensable.'"

In the case of *Welsh v. W. J. Dillner Transfer Co.* (D. C., W. D., Pa.), 91 F. Supp. 685, plaintiffs brought suit to recover, claiming that they were entitled to over-

time compensation under the Fair Labor Standards Act for work in excess of 40 hours per week within the meaning of Section 7 of that Act. The defendant contended that it was subject to the provisions of the Interstate Commerce Act, and that 48 hours was the proper basis. The defendant further claimed that the Complaint should be dismissed because it did not contain any averment that the overtime compensation claimed was for an activity engaged in which was compensable either by custom or practice as provided in Section 2 of the Portal-to-Portal Act of 1947. The Court held that the Portal-to-Portal Act of 1947 was actually an amendment to the Fair Labor Standards Act, an must be read as a part of it. The Court held that insofar as an action sought to enforce liability under the Fair Labor Standards Act for activities engaged in prior to May 14, 1947, the fact that such activity was compensable by contract, custom or practice was jurisdictional. Plaintiffs urged that the Portal-to-Portal Act had no application to the case at bar; that that Act covered cases where claims were made based on time spent either preliminary to work or subsequent to actual working time. Plaintiffs urged that the requirement of an allegation of an expressed contract or custom was not intended to destroy claims for time actually devoted to normal work. The Court said—

> "Plaintiffs have substantial authority for their position, Central Missouri Tel. Co. v. Conwell, 8 Cir., 170 F. 2d 641. On the other hand, the weight of authority appears to be that Section 2 of the Portal-to-Portal Act applies to all claims for overtime."

The Court called attention in footnote 9 to the distinction between the phraseology in Section 2, which covers any activity of an employee and that of Section 4 which

spells out in so many words the type of activity which gave rise to the Portal-to-Portal legislation.

The Court called attention to the case of *Seese v. Bethlehem Steel Co.* (D. C., Md.), 74 Fed. Supp. 412 (affirmed 168 Fed. (2d) 58, in which Judge Chesnut held, speaking of the Portal-to-Portal Act, and speaking of Section 2 of Part II of that Act—

> "* * * the Act in this respect is not limited to portal-to-portal activities as such but defines the essential characteristics of any alleged liability for non-payment of minimum wages or overtime compensation. None are to be compensable 'except an activity which was compensable by either—' contract, custom or practice."

The case of *Welsh v. Dillner,* supra, is again referred to in the case of *Love vs. United States Rubber Company* (D. C., Pa.), 92 Fed. Supp. 174.

In this last mentioned case there was a suit brought against the defendant for overtime compensation, liquidated damages and attorney fees under the Fair Labor Standards Act of 1938, as amended. It appears that during World War II the defendant operated ordnance works under a cost-plus-a-fixed-fee contract with the United States Government. Plaintiff and 25 others were engaged as firefighters to protect the plant and equipment. The time involved in the case was the period of sleeping time involved in the operation of a two platoon system. Under this two platoon system the men were required to be present on the premises three days per week for a twenty-four hour period each day, the first sixteen hours being considered working time, the remaining eight hours as sleeping time. They were paid straight

time for 40 hours, time and one-half for eight additional hours. They were not paid for sleeping time except when on rare occasions in an emergency they were called upon to work for brief periods, in which event they were paid time and one-half for the extra time actually worked. The Court stated that the question involved was whether during sleeping time the plaintiffs were engaged in any activity compensable by contract, oral or written, or by custom or practice, this as required by Section 2 (a) (1, 2) of the Portal-to-Portal Act of 1947.

The Court held that the Complaint in question did not meet the jurisdictional requirements as to contract, custom and practice, citing *Battaglia vs. General Motors Corporation.*, 2d Cir., 1948, 169 Fed. (2d) 254. In this case a summary judgment in favor of the defendant was ordered. In this case the men, while sleeping or during the sleeping hour, were confined to the premises, and could be called in case of an emergency.

In the case of *Tipton v. Bearl Sprott Co.* (U. S. C. A., Ninth Circuit), 175 Fed. (2d) 432, there was a suit brought under the Fair Labor Standard's Act to recover overtime compensation. Part of the employees were employed in a cafeteria. The Court states that the suit was instituted—

> "* * * to enforce the alleged liability of appellees under the Fair Labor Standards Act of 1938 for and on account of their alleged activities of appellants engaged in prior to May 14, 1947. The third amended complaint did not allege that such activities were compensable by an express provision of a written or nonwritten contract * * *."

The Court then said—

> "Thus the third amended complaint failed to state a claim of which the District Court had jurisdiction. It should have been dismissed on that ground."

The Court in a footnote cites the case of *Battaglia v. General Motors Corp.*, 2 Cir., 169 Fed. (2d) 254, and *Seese v. Bethlehem Steel Corp.*, 4 Cir., 168 Fed. (2d) 58.

In the case of *Redwitz vs. Ford Motor Co.* (U. S. D. C., Western District of Kentucky), 80 Fed. Supp. 265, an action was instituted by 1500 plaintiffs, formerly employees of the defendant, to recover overtime compensation and so forth under the Fair Labor Standards Act. The amount claimed was some $1,887,500. It was alleged that the defendant violated the Act in the following particular:

> "(4) Requiring plaintiffs to engage in work during their scheduled lunch and rest periods."

Plaintiffs alleged that they were employed by the defendant in carrying out a contract with the United States Government, for the production of certain goods. Plaintiffs alleged that under the contract with the Government, the defendant agreed to pay time and one-half for overtime work under the Fair Labor Standards Act. Defendant filed a Motion to Dismiss. The Court sustained the defendant's Motion to Dismiss.

In 3 A. L. R. (2d) at page 1129, there is an annotation on the question of whether or not the application of sub-section (a) of Section 2 of Part II of the Portal-to-Portal Act of 1947 was limited to portal-to-portal activities as such. Starting on page 1129 the annotation lists the cases holding that the cited section refers to all ac-

tivities and that no recovery can be had under the Fair Labor Standards Act, absent contract or custom to pay. The annotator cites the cases holding both ways. We take the liberty of quoting—

> "* * * Direct holdings or statements to this effect were made where—
>
> "—the court held that § 2 denied liability except for an activity which was compensable by either contract, custom, or practice, that the act in this respect was not limited to portal-to-portal activities as such but defined the essential characteristics of any alleged liability for non-payment of minimum wages or overtime compensation, none of which were to be compensable 'except an activity which was compensable by either' contract, custom, or practice, and that furthermore while the language included the word 'except,' it seemed entirely clear from the whole wording that the exception was the only activity which was compensable. Seese v. Bethlehem Steel Co. (1947; DC Md), 74 F. Supp. 412 (affd (1948; CCA 4th), 168 F. 2d 58).
>
> "—the court stated that § 2 is not limited to strictly portal-to-portal activities but defines the essential characteristics of any alleged liability for nonpayment of minimum wages or overtime compensation, none of which are to be compensable except an activity which was compensable by either contract, custom, or practice, and, rejecting the contention that § 2 was not applicable since the suit was not based on strictly portal-to-portal activities, held that this contention ignored the plain wording of that section, which covers all activities and claims arising prior to passage of the act and determines the compensability of all activities during an employee's day. Boerkoel v. Hayes Mfg. Corp. (1948; DC Mich), 76 F. Supp. 771.
>
> "—the court disposed unfavorably of plaintiff's contention that the instant case was distinguishable

from the vast majority of portal-to-portal cases because it was not for so-called portal-to-portal activities, and pointed out that it had been held by some of the district courts that the act applied to all suits under the 1938 Act unless the case was brought within the exceptional provisions of § 2 relating to contract, custom, or practice. Shaievitz v. Lake (1948; F DC NY), 80 F. Supp. 241.

"—the court, disposing adversely of plaintiffs' contention that their case was not a 'portal' action because they had performed guard duty on the way to their regular posts, such as checking for violations of fire regulations and stopping employees for not having identification badges, stated that the act applied to all actions under the Fair Labor Standards Act, and that the issue therefore, whether or not a particular action was a 'portal' action, was whether the overtime sued for was for an activity compensable by contract, custom, or practice. Bauler v. Pressed Steel Car Co. (1948; F. DC Ill), 81 F. Supp. 172, 182 F. (2d) 357.

"—the court, referring to § 2, stated that there is nothing ambiguous about this provision, the meaning of which is explicit and plain, and that consequently recovery could not be allowed for activities covered by 'showup' time of certain firemen where there was nothing to show that the activities covered by that time were made compensable either by an express provision of a written or oral contract or by custom or practice. McLaughlin v. Todd & Brown (1948; F DC Ind), CCH Lab Cas Para 64606.

"—the court stated that the language of § 2 was clear and unambiguous and that just two essentials for compensability were stated—an express provision of a contract, or a custom or practice; that these were the requisites of both § 2(a), subsections (1) and (2), and of § 2(b); that everything else was eliminated; that although the kinds of activities were not designated or delimited, to be compensable or

within the jurisdiction of the court, the requirements of § 2(a) and § 2(b) had to be met; and that hence, even if the activity was 'work done within the work day proper,' in order to be compensable it had to be 'under such contract provision or such custom or practice.' Kemp v. Day & Zimmerman (1948), —— Iowa ——, 33 N. W. (2d) 569."

A later annotation appears in 21 A. L. R. (2d), page 1337. Again the annotator briefs the cases under the two subheads—*"View that act* (Portal-to-Portal Act) *does not apply to regular activities of job"* and *"View that act bars all overtime claims regardless of nature."*

In the opinion, in the case at bar, the District Judge said on page 674, 97 Fed. Supp.:

"* * * Though there is some authority to the contrary in other circuits, the view adopted in our own circuit seems to be in accordance with that suggested by counsel for the plaintiffs. In Central Missouri Telephone Company v. Conwell, 8 Cir., 1948, 170 F. 2d 641, 645, Judge Gardner, speaking for an unanimous court, announced:

" 'In the instant case there is no claim seeking to recover for time consumed in walking to work or other activities either before or after the normal working hours. Here the claim is that these employees actually worked many hours in excess of the forty hours permitted by the Fair Labor Standards Act, not for activities of a Portal-to-Portal nature, such as were involved in Anderson v. Mt. Clemens Pottery Company, supra (328 U. S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515), and we agree with the trial court that it was not the purpose of the Portal Act to destroy such claims.' "

It thus appears that Judge Donohoe was of the opinion that a conflict existed as between the various circuits in the matter involved.

We are conscious of the fact that briefs in support of Petition for Certiorari should be as brief as possible. Still we believe it would be of benefit to the Court to have available the opinion of the Court in the case of *Cobb v. Aluminum Co. of America*, 226 S. W. (2d) 110. The opinion is in the Kansas City Court of Appeals. The case involved a suit under the Fair Labor Standards Act for overtime. The suit also involved a prayer for liquidated damages and attorney fees. The defendant operated a plant in Kansas City, Missouri, wherein it manufactured cylinder heads for aircraft. The plaintiffs were employees at this plant and their employment terminated upon the discontinuance of production in June, 1945. The suit was brought on January 11, 1947. Plaintiffs sought to recover for themselves and others, similarly situated, overtime wages alleged to be due them under the Fair Labor Standards Act, 29 United States Code Annotated, Section 201, et seq.

The Trial Court had dismissed the petition. The action of the Trial Court was affirmed. Judge Broaddus, in analyzing the question we are discussing, said as we shall quote. In this quotation he analyzes the cases of the country holding the rule to be as we are claiming, and then analyzes the cases holding to the contrary. The quotation is as follows—

> "Plaintiffs claim that the motion to dismiss should not have been sustained because their petition seeks to recover for uncompensated overtime not confined to portal-to-portal activities. On page 10 of their brief they say: 'The petition seeks to recover for uncompensated overtime not only for portal-to-portal activities but also for work and labor actually rendered which does not fall within the condemnation of the Portal-to-Portal Act.' This is a misconception

of the effect of the amendments to the Fair Labor Standards Act resulting from the Portal-to-Portal Act. Part 2 of the latter act says: 'No employer shall be subject to any liability * * * on account of the failure of such employer *to pay an employee minimum wages, or to pay an employee overtime compensation,* for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act' except by contract, custom or practice. (Italics ours.) This language is clear. As said in the well-considered opinion in the Seese case, supra: 'It will be noted that the Act in this respect is not limited to portal-to-portal activities as such but defines the essential characteristics of any alleged liability for non-payment of minimum wages or overtime compensation. *None* are to be compensable 'except an activity which was compensable by either—' contract, custom or practice. (Italics theirs.)

"In Kemp v. Day & Zimmerman, Inc., supra, plaintiffs made the same claim as is made here that the Portal-to-Portal Act did not prevent a recovery because the overtime involved was not spent in typical portal-to-portal activities. In rejecting the plaintiffs' contention, and in sustaining the dismissal the court said, 33 N. W. 2d loc. cit. 590, 591: 'Plaintiffs contended in oral and printed arguments that the overtime involved was not spent in typical 'portal-to-portal' activities—just before starting time and after quitting time—but was during 'the period from whistle to whistle'. Such period would appear to be 'regular time'. After referring to the statute the court says: 'It is clear and unambiguous. Just two essentials for compensibility are stated—an express provision of a contract, or a custom or practice. They are the requisites of both section 2(a), subsections (1) and (2), and of Section 2 (b). *Everything else is eliminated. The kinds of activities are not designated or delimited.* But to be compensable or within the jurisdiction of the court, the requirements of section (a) and (b) must be met. Even if the activity

be 'work done within the workday proper', as plaintiffs assert was the case, it must be 'under such contract provision or such custom or practice.' It is so stated in section 2(b).' (Italics ours.)

"In Sinclair v. United States Gypsum Co., D. C., 81 F. Supp. 365, loc. cit. 366, it is said: 'Plaintiffs' attorney, however, insists that their alleged overtime work was not preliminary or postliminary but was an integral part of the principal activities * * *'. Rejecting this the court said: 'Plaintiffs cannot recover for alleged overtime work unless they allege and prove that this work was compensable under some effective 'written or nonwritten contract' or 'a custom or practice in effect, at the time of such activity.'' Citing cases.

"In Boerkoel v. Hayes Mfg. Co., D. C., 76 F. Supp. 771, loc. cit. 775, it is said: 'Plaintiff contends that section 2 of the Portal-to-Portal Act is not applicable because his suit is not based on strictly portal-to-portal activities, that is, activities preliminary or postliminary to his principal activities. However, this contention ignores the plain wording of that section, which covers all activities and claims arising prior to the passage of the Act and determines the compensability of all activities during an employee's day.'

"In Shaievitz v. Laks et al., D. C., 80 F. Supp. 241, loc. cit. 243, it is said: 'Plaintiff urges two reasons for distinguishing this case from the vast majority of decisions. He asserts that the present action is not for so-called portal-to-portal activities. Most of the thirty-odd opinions on this question carefully point out that the suits under consideration therein concern such activities. * * * It would appear, however, that the amending Act does apply to all suits under the 1938 Act.'

"In Amelbo et al v. Pennsylvania Salt Mfg. Co., D. C., 83 F. Supp. 456 it is said, that 'the weight of

authority would seem to be that the Portal-to-Portal Act applies to all claims for overtime.'

"Plaintiffs have cited the cases of Twigg v. Yale & Towne Mfg. Co., D. C. N. Y., 7 F. R. D. 488, and Deaton v. Titusville Bldg. Corp., D. C. N. Y., 72 F. Supp. 986, in support of their contention that the motion to dismiss should not have been sustained. These two decisions have since been overruled in New York and have not been followed elsewhere. See Borucki v. Continental Baking Co., D. C., 74 F. Supp. 815; Shaievitz v. Laks et al., 80 F. Supp. loc. cit. 242. Plaintiffs also cite the decision of Conwell v. Central Missouri Telephone Co., D. C., 74 F. Supp. 542, 545. In that case, however, the suit did not involve additional activities, but plaintiffs had put in more hours in doing their work as telephone operators than they had been paid for. The opinion quotes the language of Senator Ferguson, a member of the Judiciary Committee, who actively participated in the preparation and passage of the Portal-to-Portal Act as follows: 'I answer by saying that it is the intent of the section referred to abolish every known claim that could exist under the fair Labor Standards Act (29 U. S. C. A. § 201 et seq.) the Walsh-Healey Act (41 U. S. C. A. § 35 et seq.) or the Bacon-Davis Act (40 U. S. C. A. § 276a et seq.)—specifically under the acts, except claims which may arise under any express or implied contract. It wipes out all claims that are specifically provided for in the acts referred to. I think it was the intention of the drafters of the legislation to wipe out everything under those acts that was not based upon contract or custom or practice. *That was the intention.*' " (Italics ours.)

"It then says: 'This statement seems to agree with the statements of most other Senators who discussed the matter.' The effect of the holding in that case is that the allegations of the petition there considered, implied, if not clearly expressed, an agree-

ment to pay and were sufficient under the Portal-to-Portal Act."

We, therefore, submit to the Court that the opinion in the case at bar of the Court of Appeals is in conflict with the decisions of other courts of appeals on the question we are discussing. This is an important conflict, making it necessary, in our opinion, for this Court to assume jurisdiction of the case and to finally decide the question.

Reason Number 2 Relied Upon for Granting Writ of Certiorari. The Reason Is as Follows:

"The Court Below Decided Important Questions of Federal Law, i. e., an Interpretation of the Fair Labor Standards Act of 1938 and an Interpretation of the Portal-to-Portal Act of 1947 with Reference Thereto Which Have Not Been But Should Be Settled by This Court."

The District Court held as a matter of law that during the lunch periods the employees were engaged in the principal activity of the work-week—

> "and were not merely taking care of preliminary or postliminary matters. This being so, the court has concluded that Section 2 of the Portal Act is inapplicable to this case and that the plaintiffs are not required to plead and prove a contract, custom or practice to compensate them for the hours worked during the lunch period." (Pages 8 and 9 of the Opinion, Court of Appeals.)

The Court of Appeals affirmed this rule laid down by the District Court. The Court of Appeals after stating that the guards were obliged to prevent disturbances by their presence and vigilance, and the firemen were likewise obligated to be constantly vigilant to prevent fires, then said—

"* * * yet both the guards and the firemen served to a considerable extent in a standby capacity."

The evidence shows that there was only one emergency during the period involved, and that was when a plane crashed through a roof of one of the buildings.

The evidence shows that the firemen, as has been said before, were allowed a thirty minute lunch period and it was only on the very rarest occasions that their lunch was ever interrupted, and if it was interrupted they came back and had their lunch at a later period. The firemen that were on inspection had the same privilege as the guards as to their lunch.

We submit that this Court should decide that subsection (a) of Section 2, Part II of the Portal-to-Portal Act of 1947 where it uses the words—

"No employer shall be subject to any liability * * * under the Fair Labor Standards Act of 1938 as amended * * * on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of *any* activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either"—

(1) Contract,

(2) Custom.

means any activity including alleged activities during the 30 minute lunch period involved.

The Court will remember that Part II of the Portal-to-Portal Act of 1947, above mentioned, applies to existing claims, that is, for work done before the passage of the Portal-to-Portal Act of 1947. The period involved in

the case at bar was from March, 1943, to September, 1944. *Section 4 of Part III of the Act has to do with future claims,* and has to do with claims for activities occurring after the enactment of the Portal-to-Portal Act. This Section, Section 4, describes the activities as walking, riding or traveling, and so forth, to work, and activities which are preliminary to or postliminary to said principal activity or activties. As has been stated in the opinions in the cases cited above under Reason 2, Part II applies to *any* activities, and we submit that this Court should so finally determine the meaning of Sub-section a), Section 2 and Sub-section (d), Section 2 of Part II of the Portal-to-Portal Act of 1947.

On March 6, 1943, when the new bulletin was issued allowing to the plaintiffs the thirty minute lunch period without pay, the employees knew this to be a fact.

What was the effect of the employees continuing to work after the issuance of the bulletin of March 6, 1943, and after the promulgation of the thirty-minute lunch period without pay?

In the case of *Williams v. Jacksonville Terminal Co.,* 1942, 315 U. S. 386, 62 S. Ct. 659, 86 L. Ed. 914, the Court was concerned with the question of whether or not tips received by redcaps could be considered in determining whether red caps were paid the minimum wage. The Court in the opinion says:

> "'This employment of the redcaps was at will and subject to the employers' conclusions as to the desirability of continuing their employment. * * *'
>
> "'With the effective date of the Act the employers became bound to pay a minimum wage to

their employees, the redcaps. Accordingly the latter were notified that future earnings from tips must be accounted for and considered as wages. Although continuously protesting the authority of the railroads to take over the tips, the redcaps remained at work subject to the requirement. Such protests were unavailing against the employers. Although the new plan was not satisfactory to the redcaps, the notice transferred to the railroads' credit so much of the tips as it affected. *By continuing to work, a new contract was created.* (Emphasis supplied.)

"'In Shepler v. Crucible Fuel Co., 3 Cir., 1944, 140 F. 2d 371, 374, the Court cited the 'redcap case', stating, '* * * the Court held, we think broadly and unequivocally, that continuance in an employment under a new method of computing pay creates a new contract and that the employee's consent to the new arrangement may be found from the continuance, notwithstanding repeated protests on his part.'"

The Court of Appeals in its opinion said—

"The case at bar falls in the class with the Central Missouri Telephone Company case as the Trial Court correctly concluded."

And, this we believe both the Lower Court and the Court of Appeals came to an erroneous conclusion. We do not believe that the legal conclusion to the effect that the Portal-to-Portal Act of 1947 was not applicable announced in the Central Missouri Telephone Company case was correct. We think it is contrary to the majority opinion in the country as announced in the various Courts of Appeals and District Courts. Assuming that the cited case announced the proper conclusion in that case, we believe that the Court of Appeals erred in coming to the conclusion that the case at bar fell in the class of that case. In the cited case, the employees, i. e., two in num-

ber, were on duty from nine in the evening until eight in the morning as telephone operators, and were paid for eight hours until the year 1943. In 1943 an increase in pay was requested, and an additional amount of pay was allowed by reducing the sleeping time. Thereafter Mrs. Conwell was paid for nine hours and Miss Pinkepank was paid for eight and one-half hours. The switchboards were located in buildings controlled by the defendant. The employees were not allowed to leave the rooms in which the switchboards were. Cots were placed near the switchboards to enable them to sleep at times, but these women were constantly on duty actually answering phone calls both local and long distance. There was no question of lunch period allowed in this cited case. The Court held that the allegations of the petition there considered, implied, if not clearly expressed, an agreement to pay and were sufficient under the Portal-to-Portal Act. The cited case is not a case where there was a lunch period specifically allowed and set apart. In the case at bar the only question involved is activities during the lunch period. We cannot understand how the Central Missouri Telephone Company case could be decisive of the case at bar or at all controlling, and yet it controlled the decision of both the Lower Court and the Court of Appeals.

In the case at bar, as we have said so many times, the guards knew that there was a lunch period set apart for them. They alleged so in their Complaint

In the Complaint it is alleged (see Printed Record, page 4)—

> "that between the dates of March sixth, 1943, and September sixteenth, 1944, said guards were permitted to leave their posts for a period of thirty minutes

each day to enable them to walk to the cafeteria to secure food * * *."

It was the claim *in the Complaint* that the guards were required on their way to the cafeteria and while at the cafeteria to check for badges and it was the claim that they were subject to call for an emergency. This was the basis set forth in the Complaint for the claim of overtime wages for the thirty minute lunch period.

As to the firemen, it was alleged that during the same period, they were permitted to go to the cafeteria to secure food, bring the same back to their station and to eat it. It was alleged that they were required to be on the alert for fire duty and were required to be on duty for said thirty-minute lunch period (Printed Record, page 6). This being the nature of the claim as set forth in the Complaint and the various amendments thereto, we submit that the case is brought within the case of *Battaglia v. General Motors Corp.*, 169 Fed. (2d) 254 (2d Cir.).

In the case of *Bauler v. Pressed Steel Car Co., Inc*, (7th Cir.), 182 Fed. (2) 357, 81 Fed. Supp. 172, the suit was by guards, and was one for overtime compensation under the Fair Labor Standards Act. The employees claimed they performed their regular duties because on their way to their regular posts they checked for violations of fire regulations and stopping employees not having identification badges. There is an opinion in this case in the Lower Court in 81 Fed. Supp. 172. In that opinion, Judge Campbell said—

"But the Portal-to-Portal Act applies to all actions under the Fair Labor Standards Act. The issues therefore, whether or not this is a 'portal' ac-

tion, is whether the overtime sued for here is for an activity compensable by contract, custom or practice."

Reason Number 3 Relied Upon for Granting Writ of Certiorari. This Reason Is as Follows:

"The Court of Appeals Decided a Federal Question of Law in Conflict with the Applicable Decision of This Court."

We refer to the cases of *Armour and Company v. Wantock,* 323 U. S. 126, 65 S. Ct. 165, and *Skidmore vs. Swift and Company,* 323 U. S. 134, 65 S. Ct. 161, and *Williams v. Jacksonville Terminal Co.,* 315 U. S. 386, 62 S. Ct. 659, 86 L. Ed. 914. We have heretofore discussed the last mentioned case.

We wish to discuss the *Armour and Company v. Wantock* case and the *Skidmore vs. Swift and Company* case, mentioned above. It will be remembered that these cases involved claims by employees of packing houses, who, after their regular day's work stayed on in the fire halls. Their claim was that they should be paid for the time spent in the fire halls. These fire halls were on the packing house premises. They provided accommodations for their employees; that is, the employees slept in the halls and cooked meals in the halls. The employees claim that they should be paid for the entire time spent in the fire hall because they were on call and they were confined to the fire halls and could not leave the premises.

The Circuit Court of Appeals in the Swift case held for the defendant. In the Armour case the holding was in favor of the employees. The Swift case was reversed and the Armour case was affirmed. Mr. Justice Jackson in the opinion in the Armour case says—

> "But it (meaning the Lower Court) declines to go to either extreme demanded by the parties as to working time. Usual hours for sleep and *eating* it ruled would not be counted, but the remaining hours should."

The Court will note that the time set apart for sleeping and for eating was not to be paid for. These men, however, were in the fire halls and were on call. Surely there is nothing in the law that prohibits an employer from setting apart and allowing a thirty minute lunch period—not to be paid. There is nothing in the law which would set aside the implied agreement resulting as set forth in the case above cited, i. e., *Williams v. Jacksonville Terminal Co.*

We believe it to be the universal rule of law that employers may adopt what is known as the two-platoon system, that is, they may agree with their watchmen or employees that they remain on duty for twenty-four hours on alternate days, and that they be paid for sixteen hours, while they were on duty, that is, on the day they were on duty twenty-four hours. This is the case of *Rokey v. Day & Zimmerman*, 157 Fed. (2d) 734 (Eighth Circuit).

Reason Number 4 Relied Upon for Granting Writ of Certiorari. This Reason Is as Follows:

> **"The Court Below Affirmed a Finding of Fact of the Lower Court to the Effect That During the Lunch Periods Involved the Guards Were Engaged in the Principal Activity of the Work-Week and Were Not Merely Taking Care of Preliminary or Postliminary Matters, Which Said Finding of Fact Was Clearly Erroneous."**

The Lower Court in its Findings of Fact used the following language (Printed Record, page 61):

> "The system was essentially this: Every day the Company would post a bulletin assigning each guard to a particular post and assign someone to relieve each guard for lunch at a certain time. For the purpose of clarity a representative bulletin has been set forth in the margin. An examination of these bulletins shows that in many instances a guard would be directed to relieve himself; in other instances a guard would be required to relieve others; and in still other instances, 'Rovers' were assigned to relieve guards for lunch. 'Rovers' were guards whose only duty was to relieve other guards."

The undisputed record shows that the guards and the firemen knew that from March 6, 1943, until September 6, 1944, they were not to be paid for the thirty-minute lunch period. There were four plaintiffs in this case. One of the plaintiffs, Glen E. West, testified as follows (Record, page 143):

"Q. After March 6, 1943, you were permitted to go to lunch at the Cafeteria and permitted thirty minutes?

A. That was right.

Q. That was posted as a bulletin?

A. Yes.

Q. Of course, you weren't to be paid for that thirty minutes, you understood that.

A. That is right."

The Findings of the Lower Court which were affirmed by the Court of Appeals as to the activities of the guards and firemen were as follows (Record, pages 62 and 63):

"Though the instances where a guard was required to take affirmative action were not relatively great, the court cannot lose sight of the fact that the mere presence of a guard fully uniformed, anywhere in the plant area, was a deterrent to lawlessness and necessarily beneficial to the defendant"

* * *

"The evidence shows that at various times, some firemen in each of the three groups, were actually called upon to take affirmative action for the defendant's benefit during their lunch time. Though the instances in which such affirmative action was required are relatively few, it is nonetheless apparent that the firemen were required to be constantly vigilant and consequently, even during the lunch period, their time was not their own, but belonged to the company."

As has been said before, the Lower Court found (Record, page 64) that there was no contract within the meaning of the Portal-to-Portal Act to pay for this thirty-minute lunch period, and the Court did not find that there was any custom so to do (Record, pages 64, 65).

We call attention to Judge Riddick's dissenting opinion which sets forth the facts.

The Court will remember that in the Complaint filed by the plaintiffs they alleged that they were allowed a thirty-minute lunch period as hereinbefore set forth, but they claim that during that lunch period they performed certain duties and that their lunch period was interrupted and so forth.

Judge Riddick in speaking of the Findings of Fact made by the Lower Court stated—

"The evidence on which the court reached the conclusion stated in its opinion came from only twelve of the more than 250 plaintiffs. None who testified could remember a specific instance of a call to duty during his lunch period. All admitted that unless called to duty they had an uninterrupted thirty minutes for lunch. All admitted that if the lunch period was temporarily interrupted by a call to duty the employee could return to lunch at a later period. Only one witness testified that he was always on duty throughout the lunch period. His testimony was contradicted by the evidence on behalf of the defendant supported by defendant's timekeeping records.

"I am unable to find in the facts as found by the court substantial evidence for the inference that plaintiffs were engaged in compensable work during the thirty-minute lunch period allowed them."

Evidence Produced by Plaintiffs

We have heretofore quoted from the testimony of Glen E. West, one of the plaintiffs.

—Plaintiffs' Witness Wren L. Culkin

He testified as follows:

"On March 6th there was a change made in post time when we were allowed to go to the cafeteria. That was an order made by the Glenn L. Martin Company and was in a bulletin pasted on our bulletin board." (Record, page 119.)

He further testified—

"Q. I understand. We will get to the firemen, but under this order, guards were allowed, if they so desired, to go to the cafeteria for thirty minutes.

"A. Yes, sir."

—William A. Keefer

He was the second witness produced by the plaintiffs. His exact testimony is as follows:

"Q. Sometime later were you permitted to go to some Cafeteria for lunch?

"A. Yes, I think after March 6, 1943, we were permitted to be relieved by a Rover and to eat in the Cafeteria." (Record, page 124.)

• • •

"Q. Did you ever have occasion, as far as you know, when you were on your lunch hour—as a guard I am speaking of now—to put down any fight or misbehavior or anything of that kind?

"A. Nothing more than a badge infringement.

"Q. About all you had to do, you might notice some fellow that didn't have a badge?

"A. That's right, sir.

"Q. Do you ever actually remember of having one of those?

"A. Yes, I do, I remember faintly.

"Q. Did you ever turn in a report?

"A. Yes.

"Q. Was there more than one—do you remember more than one.

"A. No, I don't believe so.

• • •

"Q. Do you remember when you were a guard of ever being called when you were at lunch in the cafeteria?

"A. Called away from the cafeteria?

"Q. Yes.

"A. No, I can't remember of any instance." (Record, pages 127, 128.)

—Alex Feilmeyer

He was produced as a witness by the plaintiff. His exact testimony is as follows:

"Q. When you did go to a cafeteria to eat, did you have full half hour at any time?

"A. If you weren't called away, yes you would have your half hour." (Record, page 131.)

* * *

"Q. Then after this March 6, 1943, you were permitted to go to the Cafeteria?

"A. Yes.

"Q. And you would go, of course, to the Cafeteria that was nearest you out at Modification?

"A. Yes.

"Q. Did you use a bicycle to go there, or did you just walk?

"A. Walked.

"Q. Did what they call a Rover come around and relieve you?

"A. Yes."

* * *

"Q. When it came to lunch, you were again relieved by a Rover and went to the cafeteria?

"A. That is right.

"Q. And you were allowed thirty minutes for this lunch?

"A. Yes.

"Q. And these cafeterias were operated by the Glenn L. Martin Company?

"A. Yes.

"Q. And they aimed to operate them at a pretty reasonable price?

"A. Yes.

"Q. And they were pretty good places to eat, weren't they?

"A. It sure was." (Record, pages 132, 133, 134.)

—Lewis Allerton

He was called by the plaintiffs. His exact testimony is as follows:

> "After March 6, 1943, we were permitted to eat our lunch in the cafeteria. The company set the time when we were to eat and the Company had rovers to go around and relieve us from our posts so that we could go and eat. However, all the posts were not covered by rovers."
>
> * * *
>
> "Q. Were there many occasions when you were unable to eat your entire lunch?
>
> "A. Two or three times." (Record, page 135.)

—Angeline E. Way

She was called as a witness by the plaintiff. She testified as follows:

"Q. You knew after you came to work you were entitled to thirty minutes to go to lunch to a cafeteria?

"A. That is right."

* * *

"Q. And you had thirty minutes to eat your lunch?

"A. That is right.

"Q. You could go to your locker room during that thirty minutes?

"A. That is right.

"Q. And you could smoke down there and be at ease, if you wished?

"A. That is right, but the locker room was too far away.

"Q. If you wanted to you could sit in the Cafeteria the whole thirty minutes?

"A. That is right, if you weren't called.

"Q. Were you ever called during the time you were there from the Cafeteria?

"A. Yes.

"Q. How many times were you ever called?

"A. At least once or twice that I know of and that was to clear employees.

"Q. During all the time you were employed there, you were called out of the lunch period twice?

"A. That is right." (Record, pages 146, 147.)

—John Kerwin

He testified in part as follows:

"Q. You remember guards were allowed to eat at the Cafeteria after March 6, 1943?

"A. Yes, sir.

"Q. And were allowed 30 minutes for a lunch period?

"A. Yes, sir." (Record, page 150.)

—Carl A. Carsey

He was called by the plaintiffs and testified as follows:

"Q. We got past that, with effort—after March 6, 1943, you were allowed to go to the Cafeteria for thirty minutes, is that right?

"A. You mean my actual time was thirty minutes at the Cafeteria?

"Q. No, I mean by that directive, after March 6, 1943, you were allowed thirty minutes for lunch and were allowed to go to the Cafeteria.

"Q. That is right, Mr. Witness? Do you remember my question?

"A. That is right, from the post back to the post.

"Q. And you did go to the Cafeteria?

"A. I did, yes, sir." (Record, pages 151, 152.)

We submit that the Lower Court was clearly wrong in making any finding to the effect that during the lunch period these plaintiffs were employed at their regular activity. This finding of fact was clearly erroneous and the affirmance of that finding of fact by the Court of Aupeals was clearly erroneous. There is no testimony in the record that these plaintiffs were engaged in their usual activity or any other activity during the lunch period. On one or two occasions when the lunch period was interrupted, these guards could come back and have their lunch at a later period.

It will be noted that both courts make this finding of fact because the guards and firemen kept their uniforms on while eating at the cafeterias.

In the cases involving the two-platoon system and in the cases involving men in the fire halls of Armour and Company and Swift and Company, hereinbefore cited, the men were confined to the fire halls. They could not leave the fire halls, but the employer was allowed to enter into an agreement or to make a rule to the effect that the employees were not to be paid for eating or sleeping time. Even though the plaintiffs did wear their uniforms, and even though they did not leave the 700 acre plant area during the lunch period, they were allowed either to go to the cafeteria or to go to the smoking area or to the locker room or to be at ease. They knew that they were not to be paid for this thirty-minute lunch period and they continued to work from March 3, 1943, until September 17, 1944, under such an understood arrangement.

It was not until long after the war was over and long after the plant was closed that claim was made to the effect that these men were to be paid for this lunch period. The undisputed evidence discloses that during a greater part of the time involved there was a guard stationed at the door of the big cafeteria during the lunch period. The undisputed evidence discloses that any signal lights that were in the big cafeteria went on over the whole floor of the building at the same time and on this floor were a number of guards and rovers regularly assigned during the period involved. There were guards and rovers and officers on duty during the lunch periods allowed to other employees, who were patrolling the halls and so forth, and who would see any signal lights that

went on and would answer them. There would be no occasion for guards at lunch to be disturbed by the signal lights.

The undisputed evidence shows that these guards were allowed a full lunch period and could go to the cafeteria and eat their lunch therein.

The undisputed evidence further shows that rovers relieved them, if necessary, and that by daily bulletin the program of allowing a lunch period was put into effect and was carried out.

It is hard for us to see how a guard or fireman who was allowed a thirty minute lunch period who was relieved by a rover or who went to the cafeteria and had his lunch during a thirty minute lunch period and then returned to his post, or in case he desired to smoke went to the smoking area, can claim that he was carrying on his regular activities because of the fact that he had on his uniform and because of the fact that he might be called on an emergency if an emergency ever occurred.

We ask the Court not to forget that all of the employees were allowed a thirty-minute lunch period and that they left their machines, tools and so forth and went to those various cafeterias and had their lunch. They were not paid for this and never were paid for it.

We submit that this Court should hold that the Findings of Fact referred to above made by the Lower Court and affirmed by the Court of Appeals should be held to be clearly erroneous.

Reason Number 5 Relied Upon for Granting Writ of Certiorari. This Reason Is as Follows:

> **"The Court Below Affirmed a Finding of Fact of the Lower Court to the Effect That During the Lunch Periods Involved the Firemen Were Engaged in the Principal Activity of the Work-Week and Were Not Merely Taking Care of Preliminary or Postliminary Matters, Which Said Finding of Fact Was Clearly Erroneous."**

As we have said before, there were a limited number of firemen who were plaintiffs. The lunch period bulletin applied to firemen as well as to guards. Each morning there was a bulletin put up in the fire hall assigning the firemen to various stations, i. e., inspection in the various buildings, to the fire truck and three or four of them to the fire hall. These firemen left the fire hall and went out on inspection and when lunch came went to the various cafeterias just as did the guards. Two or three firemen assigned to the crash truck had a lunch period assigned to them. They came in at that lunch period. These firemen went to the cafeteria which was a few steps away, got their lunch and ate it at a table in the fire hall which was used for that purpose. The three or four firemen who were stationed at the fire hall, who were ready to drive the fire truck out in case of necessity, likewise at their lunch period went to the cafeteria, got their lunch, and ate it at the table provided for that purpose. They were all allowed a thirty minute lunch period and if a lunch period was interrupted by a fire, they got their lunch at a later period.

The evidence shows that during all of the lunch periods from March 6, 1943, to September 17, 1944, the

pumper was only called out 28 times during the three lunch periods. The period involved is over eighteen months. There were three shifts every twenty-four hours and three lunch periods every twenty-four hours. During the entire period the fire truck was not called out but only twenty-eight times during the lunch periods. The plaintiffs produced a witness, Reeder, who was the ambulance driver, and the exhibit or record shows that he was only called out during a lunch period from March 6, 1943, to September 16, 1944, on three occasions. The witness, Reeder, was the only one who testified in re ambulance calls. The record of these calls are Exhibit 98 (Printed Record, page 278), Exhibit 99 (Printed Record, page 280) and Exhibit 100 (Printed Record, page 281), and Exhibit 101 (Printed Record, page 101). The undisputed evidence shows that when their lunch periods were interrupted, as has been said before, they were allowed a thirty-minute lunch period later on in the day.

On page 183 of the Printed Record appears a photostatic copy of the Daily Report made by the Protection Department; page 200 of the Printed Record covers the guards. The fire report starts on page 202 of the Printed Record. This shows the nature of the daily reports. The daily assignments of the firemen to the various duties appear on pages 203, 204 and 208 of the Printed Record.

Reason Number 6 Relied Upon for Granting of Writ of Certiorari. This Reason Is as Follows:

> **"Under the Evidence the Court of Appeals Should Have Held That the District Court Erred in Not Applying the Rule of 'De Minimus Non Curat Lex.'"**

The evidence disclosed that on the very rarest of occasions either the guards or the firemen were called from

their lunch period. While the plaintiffs strained to get in evidence to this effect, the evidence discloses that on only one or two occasions during the period involved was the lunch period interrupted. Only twelve witnesses were called and only two or three of these witnesses could give any evidence of any interruptions of their lunch periods. The plaintiffs introduced no testimony as to the length of time spent on the interruptions or whether it was just answering a phone or whether it was leaving the cafeteria. The undisputed evidence is if they did leave they could have their lunch period at a later time. The number of the interruptions were so minimal as we believe to bring the case within the de minimus rule.

We believe the burden is upon the plaintiffs to prove the time it is claimed that each individual worked, and where that is not done, and no attempt is made to do it, and where the indefinite interruptions claimed are so very, very rare, then the de minimus rule, we believe, applies.

We call the Court's attention to the case of *Jax Beer Co. v. Redfern* (5th Cir.), 124 Fed. (2d) 172. Paragraphs 5 and 6 of the syllabus are as follows:

> "Evidence concerning number of hours worked and salary received by employees was insufficient to sustain judgment for employees for overtime compensation, liquidated damages and attorney's fees in action brought under the Fair Labor Standards Act of 1938. Fair Labor Standards Act 1938, §§ 1-19, and §16 (b), 29 U. S. C. A., §§ 201-219, and § 216(a).
>
> "The Circuit Court of Appeals would not uphold finding and judgment of lower court which tried case without jury, where, in order to do so, it would be necessary to base decision upon guess, speculation and averages made up for the uncertain recollections of plaintiffs."

CONCLUSION

Petitioner submits that the decision of the Court of Appeals sought to be reviewed is in conflict with the decisions of the Court of Appeals for the Second, Third, Fourth and Ninth Circuits;—this in its interpretation of the meaning of the Portal-to-Portal Act of 1947. It, likewise, is in conflict with those Circuits in holding the non-applicability of the Portal-to-Portal Act.

The point of conflict has as yet not been decided by this Court, and it is necessary that this Court assume jurisdiction because of such conflict; that the opinion likewise conflicts with the same Circuits in its interpretation of the Fair Labor Standards Act of 1938; that in addition thereto, the opinion of the Court decides a question of law involving the Fair Labor Standards Act of 1938 in conflict with the applicable decisions of this Court; that the Lower Court made erroneous findings of fact which were erroneously affirmed by the opinion of the Court; that under the evidence the Court of Appeals should have held that the District Court erred in not applying the rule of De Minimus Non Curat Lex. For these reasons, and the other reasons set forth in the Brief, the Petitioner respectfully prays for a Writ of Certiorari to the Court of Appeals for the Eighth Circuit to review the decision of that Court in this case.

Respectfully submitted,

J. A. C. Kennedy,
George L. DeLacy,
Leo Eisenstatt,
Omaha, Nebraska,
Donald Leach,
Columbus, Ohio,
Attorneys for Petitioner.

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In the
Supreme Court of the United States

October Term, 1952

No. 326

THE GLENN L. MARTIN NEBRASKA CO., A CORPORATION,

Petitioner,

vs.

WREN L. CULKIN, GLEN WEST, FRANCIS H. MASKER, AND ALEX FEILMEYER, INDIVIDUALLY AND AS AGENTS AND REPRESENTATIVES TO MAINTAIN THIS ACTION FOR AND IN BEHALF OF ALL EMPLOYEES SIMILARLY SITUATED,

Respondents.

STATEMENT AND BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

As we view the matter there are just two questions involved in this proceeding and both involve only basic questions of fact. These are:

1. Is it necessary to plead and prove a contract, custom or practice when the activities involved, as in the present case, are substantially those of the regular workday of the employee?

2. Is there a conflict of holdings between the various Courts of Appeal of the different circuits?

FACTUAL STATEMENT

On pages 2 to 12, inclusive, of its printed Petition and Brief herein, Petitioner sets out a brief summary of the facts. A true understanding of the questions involved requires, we think, some enlargement on this statement. Also, it seems to us a rather peculiar procedure, to say the least, to turn, as Petitioner has, to the dissenting opinion of Judge Riddick of the Court of Appeals for the facts in the case rather than to the specific findings of the Trial Judge which, in turn, were likewise found and approved by the majority opinion of the Court of Appeals in this case.

These facts are important and must be kept in mind. This was a war plant engaged in the assembly and modification of many hundreds of war planes during the war. It was of the utmost importance that this highly important military endeavor be carefully guarded and protected every moment. Some 12,000 or 14,000 were employed on this seven hundred-acre enclosed plant area. They worked in three shifts around the clock, seven full days a week, day after week and month after month. It was of the utmost importance that fires be prevented

as well as that they be put out if and when one started. It was also of the utmost importance that throughout every hour and every minute of every hour, day and night, the entire plant be protected against sabotage, theft and disturbances of any and every kind. How well this was accomplished over the eighteen-month period here involved by these particular respondents is best shown by the fact, as correctly stated by Petitioner, that only one serious emergency occurred during all of this time; and that was when a plane flying in the air crashed through a roof of one of the buildings. There was hardly any way these Respondents could have prevented that.

There were twelve to fourteen firemen on each shift and usually from about forty to forty-eight guards on each of their shifts. It must be kept clearly in mind that not only the protective force but the entire plant force worked three full shifts so that the plant was in full operation day and night and every hour of the day and night during this period.

The facts are further detailed in the Supplemental Record forming a part of the record in this case. The Court's attention is respectfully directed to the headnote appearing on pages 1 and 2 of said Supplemental Record, all in explanation thereof.

The simple fact is this: These firemen worked primarily in the same manner as regular firemen in the fire department of a city or town, except only that here more watching and inspection are involved because of the particular hazards growing out of the work and type of work of this plant. The duties of the guards were substantially those of a regular town or city police officer

walking his beat, with some additional activities here due to the needs of the work and the large number of employees in this compact area and also involving some particular duties of watching and checking specific operations and some messenger service.

It is and always has been the position of Respondents that their activities during the so-called half-hour lunch period were almost exactly the same as during any other part of the day.

Before March 6, 1943, they ate their lunch at their post. Then the directive (page 4, Petitioner's Petition) was issued by the employer. Thereafter, *on paper* a different plan of operations was supposed to be followed by the guards. This, however, is a case to which the well-known statement that "It is a condition, not a theory, that confronts us" has full application.

It is not a question of what these Respondents *could* do in theory; it is a question of what, under direction of their superior officers and the compulsion of their work, they were required to do and *did*.

Briefly then, what are the facts?

As to the firemen, before March 6, 1943, all except the two or three out on inspection brought their lunch with them and at some available time around midshift ate their lunch at a table in the fire house. All were required to be in full uniform, even while eating. All were required to be ready at a second's notice to answer a fire call or other call to more active duty. Group by group they manned the crash truck and ambulance. The planes were flying in and out all hours of the day. This fact, together

with the great number of employees generally, necessitated frequent use of the crash truck and the ambulance. The two or three firemen on inspection, in addition to full uniform, were required to carry portable telephones. Before March 6, 1943, they could eat their lunch when and where they wished, still, however, being in full uniform and awake to their surroundings and with their portable telephones strapped over their shoulder. What change took place when this bulletin was issued on March 6? Exactly this and nothing more: thereafter instead of bringing their lunch the firemen, not on inspection, went one by one to the cafeteria next door, hastily picked up a tray of food, returned to the fire house and ate it there at the same table in exactly the same manner as before. The two or three firemen on inspection now ate in the cafeteria near which they might be at eating time. They still ate in full uniform, required to keep their caps on and their portable telephones over their shoulder and ready to answer any call, including plugging in their phones and answering signals flashed over the plant by a light system. Furthermore, meal time of itself with three to five thousand employees crowding into these cafeterias was a necessary and appropriate time for these firemen inspectors to be in a cafeteria checking and watching at the very moment they swallowed their bit of lunch. There is not even any claim of any witness in this entire record that any fireman ever found it possible to wander off to a locker room during a so-called lunch period. Where is there any difference between the *activities* of these firemen during the so-called lunch period and their regular required activities during every other hour of their regular workday? Throughout all the long history

of this litigation counsel for Petitioner has entirely failed to point out one iota of difference save only that during the lunch period, when it was not interrupted, the firemen, in addition to their regular activities, chewed and swallowed a little food; but without at the same time giving up or leaving any of their regular duties or activities.

Petitioner repeats and repeats the statement that these employees were only interrupted in their actual lunch period on rare occasions. If they had never been actually interrupted by a fire, it would not be important. Is a city fireman on duty and performing his regular activities entitled to pay only while he is answering a fire call or fighting a fire? That seems to be the position of Petitioner here. Of course, this is not the practice. Anyone is familiar with the fact that regular firemen spend much of their time just sitting around the fire barn either reading or playing cards or listening to a radio, being, however, alert to answer immediately to a fire call.

The same considerations exactly apply to these guards. A policeman on his beat may actually stop a disturbance, catch a burglar or make an arrest only once in a month. His purpose and his presence in walking his beat in full uniform is to prevent law violation. The same is true of these guards. It is undisputed in this record that they, and every one of them, were specifically required by direct orders of their superior officers to remain in full uniform throughout every minute of this 8½-hour shift period. Certainly some of them could go to the cafeteria and eat their lunch there but on the way to and from the cafeteria and while in the cafeteria they, too, were re-

quired specifically to remain in full uniform and were not permitted to remove their cap or insignia or gun even while sitting down to swallow a little food.

Furthermore, and again remembering that during the lunch period four or five thousand employees crowded into these cafeterias, it was most appropriate that guards in uniform walk in and out of the cafeteria and that some of them be there among all of these other employees. It is a matter of common social knowledge that disturbances, thefts and other law violations occur more generally in such crowded conditions than elsewhere. It is true that on some occasions a guard was stationed at one door of one of the cafeterias as a regular guard post, but one guard in that position could not possibly serve the need of guards throughout all of the cafeterias with all of these employees eating there. It should also be remembered that the cafeterias were only open for lunch about an hour and a half, midway in each shift, and all of these employees had to crowd in there and eat during that brief period.

Incidentally, there were three cafeterias, not five. Two of theme were divided into two sides or divisions but they were still only two large adjoining rooms and not separate cafeterias.

Only two or three rovers were furnished to relieve all of these guards. It was the plan that the others were to "relieve themselves," whatever that meant. It does not appear just who was to relieve a guard who was relieving another guard. Again, it is a matter of common social knowledge that saboteurs, and there were some during the war, would watch a plant and determine

when it was weakly guarded and perform their acts of sabotage during such period. Petitioner knew this very well. That was the basic reason for the change from 8 to 8½ hours beginning March 6, 1943; that is, so that no part of the plant would remain unguarded even briefly at the time of changing shifts. Exactly the same considerations applied during the so-called lunch period.

Again on paper, according to this directive, these guards *could* do this and that. They *could* go to the locker room or be at ease. But *did* they? Was it possible as an actual matter of fact and practice for them to so be at ease? Petitioner has had and has the names and addresses of all of their employees. Not a single one of them was called as a witness by Petitioner to show even a few incidents when any of these guards would be found lying around at ease or loafing in the locker room during the so-called lunch period. In fact, as stated by one of the witnesses, the locker doom was too far away from practically all of them to even have time to walk there and back in a half hour.

We will not prolong this statement by quotations from the specific findings by the Trial Judge which will be found in the Record and which the Court will want to read in full, anyway. We do call attention to this fact: Trial of this case was started in February, 1948, after many previous arguments on pleadings, etc. After several days trial, the Trial Judge became temporarily indisposed and it was necessary to adjourn the trial for a time. Then other matters developed, including litigation over the country in other cases, and the trial was not resumed until July, 1948. Then the evidence was heard

over a further period of more than two weeks. Then briefs were filed and matters presented from time to time in connection with legislation and opinions of this and other Federal Courts. Thus, over a long period of time the Trial Judge had all of these matters under consideration repeatedly, and in detail. If there ever was a case in which Rule 52 of the Federal Rules of Civil Procedure should be strictly applied, this is such a case.

Petitioner repeatedly refers to what it calls "the undisputed evidence." The only factual point in the evi dence not disputed is the fact of the issuance on paper of the directive of March 3, 1943, effective March 6, 1943. There is extensive and detailed dispute in the record in the way of the evidence of Respondents as to what actually happened, notwithstanding this paper directive.

Petitioner draws some support from the above mentioned dissenting opinion of Judge Riddick, and particularly the last portion thereof appearing on page 11 of Petitioner's Petition and Brief. With all due respect to Judge Riddick there is an obvious basic error in his reasoning and his conclusions. He seems to have been influenced considerably by the fact, as he states, that only 12 of some 250 plaintiffs were called to testify. This point was never raised, at least by way of dispute, at any time during the trial or the appeal to the Court of Appeals or the argument in the Court of Appeals. Therefore, there was no occasion to call the attention of Judge Riddick to the true picture in this connection. Until his dissenting opinion was written and published there was no thought of any question on this point. The simple fact is that at the trial this matter was covered by a statement in

open court at the close of Respondents' case and was not questioned by the Trial Court or counsel for Defendant and Petitioner. The statement made by the trial attorney for Plaintiffs and Respondents is found on page 158 of the Record. Perhaps the language and the English employed could be improved upon, but we quote this statement exactly as it was made. It was our position then, and it is our position now, and as stated was never questioned until Judge Riddick, apparently without having noted this statement, wrote his dissenting opinion. The sttaement is this:

> "MR. MURPHY: Now, if the court please, I would like permission to have the record show this very brief statement, and that is in support of our theory of proof of this case. As outlined in procedure in many other cases, we have called representative employees, old and young, guards and firemen, men and women, particularly a number who were there throughout the entire period; covered the general picture; many of the individual situations; the particular situation with respect to some that were not in the ordinary line of work of the general run, so that as I view the evidence thus far adduced by these witnesses covers the entire picture of the employment as to all parties of the case, and that any further witnesses or testimony would be merely repetition and unduly extend the record and that is our theory at this time, and the plaintiffs rest."

Thus, it is necessary to multiply the testimony of each of the 12 witnesses by 3 to cover each shift and by the additional number of guards on some posts. Again, with all due respect to Judge Riddick, we insist the Record shows a great many specific instances of calls to active duty during the lunch period. Furthermore, we

are sure the Record in no instance shows any witness stating that unless called to duty he had an uninterrupted thirty minutes for lunch or that if interrupted by call to duty he could return to lunch at a later period. In this connection, attention is again directed to the plain fact of the evidence and that is that when any witnesses, in answer to questions upon cross-examination, made any statement to the effect that they *could* have a half-hour lunch period or that they *could,* if interrupted, return at a later period, they were referring specifically to the paper directive. Each and all of them made it abundantly clear that this did not work out in practice. When returning after an interrupted lunch period, the cafeterias would be closed. Also, we fail to find in the Record support of Judge Riddick's statement that "only one witness testified that he was always on duty throughout the lunch period." Every one of these twelve witnesses testified not only that he but every other guard and fireman on every shift "was on duty throughout the lunch period." Also, we fail to find the contradictory evidence referred to by Judge Riddick. The simple fact is, as the Record discloses without dispute, that even the few witnesses called by Petitioner, with only one exception, fully corroborated the testimony of all Respondents' witnesses to the effect that they were on full duty throughout the entire 8½-hour shift, including the so-called lunch period.

The contradiction referred to is only apparent; not real. Respondents' witness, John E. Kerwin (Supp. Record 16), testified he had to *read* the water record every twenty minutes and *report* it every hour. Incidentally, he testified that this was true as to all three shifts on that particular post. None of the other men who worked that

post were called by Petitioner to dispute this in the least. Petitioner does a lot of talking about this guard post not being interrupted because they only had to *report* the water reading once an hour. But that isn't the point. The point and the undisputed evidence is that they had to *read* it every twenty minutes and this was true during any lunch period as well as at any other time.

Without further prolonging this discussion of the facts, we think it might be advisable to quote in detail from the Record, the testimony of Respondents' witness, Alex Feilmeyer. Petitioner on page 58 of its Brief refers to some brief excerpts of the testimony of this witness and on page 60 of its Brief to very brief excerpts from the testimony of the above mentioned witness, John Kerwin. These are perfect examples of lifting a few words out of the context. The testimony of Alex Feilmeyer in its entirety is typical of the testimony of all of the other witnesses and applicable to a considerable extent to all posts on all shifts. It covers this point of number of interruptions. It will be noted that far from failing to remember any interruptions, he testifies specifically that these would occur at least three or four times a week and that he was unable to get back and eat his lunch later and finally had to just quit eating any lunch at all. His testimony also covers the undisputed instructions of the superior officers to all guards. It also covers the complaints made by these employees during this eighteen-month period until Petitioner began paying for this lunch period after being called upon by representatives of the Wage and Hour Division. It will be remembered that the references to particular pages and lines refer to the primary record so that this narrative statement could easily

be checked. The testimony of Mr. Feilmeyer (Supplemental Record 7, 8, 9) is as follows:

"ALEX FEILMEYER, witness called on behalf of plaintiffs. Employed continuously as guard from August, 1942, to April, 1946, and having worked all three shifts, usually as guard at main gate.

Direct Examination—page 137, line 16 to page 143, line 18.

"I knew about the order issued on or about March 6, 1943. Up until then I had brought my lunch and ate when and where I could and was paid full time, irrespective of where I ate. Beginning March 6, 1943, we were to be relieved by a guard. You would go to the cafeteria and get your lunch and either take your lunch and eat it there, or eat it on the post; either way. We were instructed that in case our light went on, or anything, it was our duty to phone in and find out what the order was, and if there would be an emergency we were supposed to leave our lunch and take care of whatever it might be and then go back, and so on. There were signal lights at the cafeteria up at modification. The light would flash quite frequently. I would say three times a week, maybe four. On the first shift it was worse than the second and third. If the light flashed you would go to the phone and if it was probably someone quitting, or you had to pick up someone at the plant, you would have to leave your lunch and go up and get whoever it was and bring them back and go down and eat, if you had time to go back. On the first shift I would leave my lunch quite often. Finally, I just quit taking my lunch at all and would eat when I got home, because I wouldn't have time to eat. It seemed like during the first shift there was generally a lot of activity there and that was the reason I forgot my lunch entirely.

"We had side arms and under instructions from our officers, who were civilian officers, we wore these at lunch. We also had a cap with insignia on it and we were not permitted to leave that off when we went to lunch. These instructions were from our officers. This continued right along after March 6, 1943, and on after September 16, 1944. I remember the date of September 16, 1944, and that following that we were paid for 8½ hours. There was no change, as a matter of actual fact, in our way of working on or about September 16, 1944, either as to the lunch situation or anything of that sort. The officer I referred to was Captain Berry. He was a civilian captain; not an army captain. I talked with him ten or twelve times about this lunch situation over the period from March 6, 1943, to September 16, 1944. He told me I was on duty at all times whether I was in the cafeteria, or out; even though I was relieved, in case someone was in the cafeteria and didn't have a badge on, it was my duty to see where the badge was, or their identification; if any trouble would arise while I was in there, it was my duty to try and straighten it out; or, if I was subject to call, in case the light went on and I had to call in, and I brought that up to him, I imagine, ten or twelve times."

Page 147, line 16 to page 148, line 13:

"I told Captain Berry I thought we should get paid for the half-hour, as we were on duty and had to check badges, and so on, and then be called in case the light went on and gave us some duties to perform and we would have to go and drop our lunch and come back later and eat it. That was the kick I had about it, that our half-hour wasn't our own. He told me he didn't have anything to do with that, but as long as we had that badge on we were on duty. He said he couldn't do anything about the pay check. The men, through an organization, were

making complaints about the fact that our pay was not being based on 8½ hours. I never did agree with Martin, or anyone else, that I was entitled to only 8 hours pay for that period of time."

Cross-Examination—page 162, line 13 to page 164, line 6:

"If I was called out, no record of that would be made. I would just have to pick up my lunch some way. A lot of times I wouldn't, after I came back. I remember being called out while at lunch on many more than four or five times altogether. I would be called to go up to the plant and pick up a vendor, or there would be a group of people quitting and I would have to go and take them through the plant, and so on and so forth, and sometimes on some days that would be all day long; there would be people quitting on Fridays, especially, or some vendor would come in the plant and they would tell me to go and pick him up. A vendor is a person who would contact some of the purchasing departments and we would have to pick them up at the gate and maybe the other guards would be tied up and they would say, 'You have to go. They are waiting for you.'"

Usually four guards were posted at this particular gate. Thus, the testimony of this one witness covers the individual similar experience of twelve men; that is, four men on each of the three shifts per days of twenty-four hours. The testimony of all of these witnesses was submitted and received in such similar representative capacity in keeping with the uniform practice in cases of this type.

Petitioner submitted officers' daily report for August 16, 1944, as representative of these daily reports. This covers the day shift for that day (R. 203). Now the

lunch period for that particular day was 10:30 A. M. to 12:30 P. M. (R. 160). Yet this particular report of August 16 shows a fire call to which the fire department employees responded from 10:55 A. M. to 11:45 A. M. Thus, on the only occasion which Petitioner furnishes us with their own records it appears that the firemen were actually on a fire call during fifty minutes of their supposed lunch period. It might be argued from this that this was a daily occurrence but, of course, we make no such argument. It was not a question of whether they were actually out fighting a fire every other day or so during the so-called lunch period. The point is that the fires occurred irrespective of the time of day or night and they accepted fire calls exactly the same during the so-called lunch period as on any other occasion. That was what they were there for. That was their regular workday activity along with the inspection work and other similar matters.

Petitioner states on page 30 of its Brief that none of the other 10,000 or 12,000 employees were paid for their lunch periods. So far as we know that is perfectly true. But it was not the custom or practice of the mechanics, welders, bookkeepers, etc., to continue their regular work during the lunch period. Without question they had a perfectly free half-hour lunch period except only that they could not leave the plant area. We have never contended that the mere fact that these guards and firemen could not leave the plant area would make them eligible for pay during the lunch period.

Petitioner further states on page 62 of its Brief that "It was not until long after the war was over and long after the plant was closed that claim was made to the effect that these men were to be paid for this lunch

period." This statement is quite in keeping with the repeated statement of Petitioner as to "undisputed evidence." Now the simple fact is as shown without dispute by the above quoted testimony of Alex Feilmeyer, and other witnesses testifying likewise, all of these employees complained throughout the period of March 6, 1943, to September 16, 1944, that they were not being paid for this lunch period and made claim for such pay. If our memory of recent history is correct, and we have reason to remember it very definitely, the war was in full force during these months. This suit was originally instituted in January of 1945. The war was still very much with us at that time and for several months thereafter. The plant was not closed until September, 1945, or more than two years after these claims were first made and nine months after this suit was first filed. Respondents are in no way responsible for the many and long delays that occurred in this litigation thereafter.

There is just one other factual situation we wish to discuss before passing on to a review of the authorities.

Petitioner relies almost entirely upon opinions of a few courts which, however, were in cases involving the two-platoon system. It should be remembered that at all times in the present case there were three regular daily shifts. This was true of the entire plant. There was no closing down of any department during the night or at any other time. This two-platoon system, limited almost entirely to firemen, was used in some instances in other plants. Mostly these were packing house plants. Invariably those plants operated only one or, at the most, two shifts per day. During at least 8 hours over the night

lunch period for that particular day was 10:30 A. M. to 12:30 P. M. (R. 160). Yet this particular report of August 16 shows a fire call to which the fire department employees responded from 10:55 A. M. to 11:45 A. M. Thus, on the only occasion which Petitioner furnishes us with their own records it appears that the firemen were actually on a fire call during fifty minutes of their supposed lunch period. It might be argued from this that this was a daily occurrence but, of course, we make no such argument. It was not a question of whether they were actually out fighting a fire every other day or so during the so-called lunch period. The point is that the fires occurred irrespective of the time of day or night and they accepted fire calls exactly the same during the so-called lunch period as on any other occasion. That was what they were there for. That was their regular workday activity along with the inspection work and other similar matters.

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period the plants were closed and inoperative. Thus, during this night period there was no fire danger resulting from plant operations because there were no operations. The presence of any outsider could be readily detected in the quiet of the night. Such was not the situation in the present case. In those two-platoon system cases generally the courts allowed a workday of 16 hours. It is true that in some instances the courts speak in passing of deductions from working time of "sleeping and eating time." In none of these cases was any particular point made of the eating time. Under this two-platoon system one complete group worked a full 24 hours. Then that group would be off and the other platoon on duty the next 24 hours. That is, each worked alternate 24-hour straight periods. The members of each platoon, of course, had to sleep during that 24-hour period. While many of us get along on less than 8 hours sleep a day, yet we think it is quite well recognized that particularly among men and women engaged in manual labor, 8 hours sleep is the normal thing. Now, as stated, the courts, in these two-platoon system cases, allowed pay for 16 hours. Thus, as a matter of fact, even in those cases the employees were considered as being on duty and entitled to pay during their so-called eating time. Even if we reduce the sleeping time some it should be remembered that there are three meal periods in each 24 hours. Limiting each to the minimum of ½ hour means 1½ hours per day. If this is included in the 8-hour period mentioned then it left only 6½ hours sleeping time. If 8 hours is a little more than necessary as actual sleeping time, 6½ hours just as surely is too short an allowance. We repeat, therefore, that even those cases when ana-

lyzed are found to have allowed at least a portion, if not all, of the eating time as regular compensable working time.

There is no similarity between the situation as to activities in those two-platoon system cases and the activities in the present case. Of course, in those two-platoon system cases the employees performed none of their regular activities during this 8-hour night period whether we call it sleeping time or eating time, or both. At least we find no indication in any of the court opinions in those cases that, contrary to the laws of nature, those employees during that night period slept standing up on their feet in full uniform and with their eyes open.

PROPOSITIONS OF LAW

At the outset of this discussion we call attention to the fact that Petitioner rests its claim that this Court should review this case upon the proposition that there is a conflict of holdings between the various circuits; and particularly that the Second, Third, Fourth and Ninth Circuits hold contrary to the Eighth Circuit in this case and in the case of *Central Missouri Telephone Company v. Conwell,* 170 Fed. 2d 641. It is further the contention of Petitioner, as we understand it, that the Courts of these four circuits hold that it is necessary to plead and prove a contract, custom or practice even though the activities involved are those of the normal workday.

We shall demonstrate the falsity of these propositions. We shall demonstrate clearly by an analysis of

Petitioner's authorities and the citations of and quotation from recent opinions of the Courts of Appeal of three of these four circuits that far from there being any conflict, those Courts of Appeal approve and follow the present case and the aforesaid *Conwell* case. The result is that there simply is nothing whatever in this case requiring or even indicating any necessity for the granting of the Petition for Writ of Certiorari or the consideration of this case by this Court.

This proposition, while not proven, is certainly indicated by the fact that Petitioner is required to fall back almost entirely upon District Court opinions and, in fact, two State Court opinions. Following the adoption of the Portal to Portal Act there was something of a flurry of District Court opinions arrived at apparently under the mistaken idea that the Portal to Portal Act repealed the Fair Labor Standards Act. Of course, that was found to be far from the truth. Mature consideration of the problems involved has resulted in uniform holding of the Courts of Appeal of every circuit in the country where the issue has been squarely presented. We repeat, there remains nothing for the consideration and decision of this Court.

The position of Petitioner in this matter, as we understand it, is based primarily upon its contention that it is necessary to plead and prove a contract, custom or practice even though it be found that the activities involved are not portal to portal in character.

We think the Amended Complaint in the present case alleges and the evidence proves such contract, custom and

practice but we do not rest our position on this proposition alone.

It is conceivable that a situation might arise in which the activities involved were not exactly portal to portal in character and yet were not the normal activities of the regular workday. In such a situation perhaps it is necessary under Section 2 of the Portal to Portal Act to clearly and specifically plead and prove such contract, custom or practice, but that is not the situation here. In the present case the findings of the Trial Court and the Court of Appeals are not simply that these activities were not portal to portal in character. The decision in the present case is based rather upon the affirmative finding that the activities of these Plaintiffs and Respondents during this half-hour so-called lunch period, were the regular activities of their normal workday.

In the very nature of things it necessarily follows then that there was a contract and that it was the custom and practice to pay for such activities. It should be remembered that the language of the Act is the "activities"; not the time of day or the name given to some particular period of the day. When one enters into the employ of an employer there is always necessarily a contract under which the employer agrees to pay the employee for the time the employee devotes to the employer's service in the activities covered by the employment. It is always the custom and practice to pay the employee for such activities and for all the time devoted to such activities. The only alternative is employment without pay. We think this type of relationship was terminated

permanently by the Thirteenth Amendment to the United States Constitution.

The basis of the present decision and the rule of law now uniformly adopted in all circuits, so far as we can determine, is based upon the affirmative findings as above mentioned. In the present case these findings of the Trial Court, after long and careful consideration and as affirmed by the majority opinion of the Court of Appeals of this, the Eighth Circuit, are found particularly in that portion of the Trial Court's opinion found in the first full paragraph on page 71 and the latter portion of the last paragraph on page 71 and extending over to page 72 of the Record. We quote:

> "This view, that Section 2 of the Portal Act is directed against claims for compensation for activities such as dressing work, traveling within the plant to job location, etc., which are different from the *activities which comprise the regular normal part of employment* and that the section has no application where the work for which compensation is being claimed is the same kind of work as was performed throughout the remainder of the workweek, has also been accepted by courts in other circuits.
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> * * *
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> "Whether the time is Portal-to-Portal time depends upon the nature of the activity engaged in during the period in question; and not upon the term by which the period is known. *The evidence in this case clearly establishes as a matter of fact that during the 'lunch periods' in question, the employees were engaged in the principal activity of the workweek* and were not merely taking care of preliminary or postliminary matters. This being so, the court has

concluded that Section 2 of the Portal Act is inapplicable to this case and that the plaintiffs are not required to plead and prove a contract, custom or practice to compensate them for the hours worked during the lunch period." (Emphasis added.)

On page 32 of its Brief, Petitioner discusses the case of *Battaglia, et al. v. General Motors Corp.*, 169 Fed. 2d 254. This is Petitioner's supposed authority for their position with respect to the Second Circuit. Also in this connection Petitioner, on page 36 of its Brief, discusses and apparently lays great stress on the opinion of the District Court of Maryland in the Fourth Circuit in *Seese v. Bethlehem Steel Co.* This case was appealed and the Court of Appeals opinion is found in 168 Fed. 2d 58. We will discuss these two cases together and follow them in later decisions and thus, as stated, demonstrate clearly and beyond question the complete lack of foundation for Petitioner's position in this present matter.

It takes much stretching of the imagination to find anything in this *Battaglia* case from the Second Circuit which in the slightest degree supports the position of Petitioner. As especifically stated in the opinion, the claim there was for activities *"preliminary to, and after engagement in, the principal activities of the employees."* That is the direct opposite of the situation in the present case. It is perfectly true that in the opinion, referring to the activities generally and after detailing these activities *"before and after their main activities,"* passing reference is made to "lunch and rest periods during which their time was not entirely at their own disposal." However, just what activities were involved in that connec-

tion is not disclosed. Probably it was only that the employees could not leave the premises. As above stated, we make no claim here on that point.

The important point, however, in connection with this *Battaglia* case is that the only point actually presented and argued and decided in the Court of Appeals was the question of the constitutionality of the Portal to Portal Act. Nothing more can be read into that opinion no matter how hard one may try.

In the above mentioned *Seese* case from the Fourth Circuit, again the only point actually presented, argued and decided was the constitutionality of the Portal to Portal Act. Little is said about the activities involved but from what is said it is at once perfectly clear that these were portal to portal in nature and by no stretch of the imagination could they be considered as normal activities of other portions of the regular workday. In fact, the opinion specifically refers to the activities involved in the following language:

> "* * * but recovery is asked solely on the ground that plaintiffs were required to be on the premises of defendant before and after working time for the purpose of changing clothes and walking to and from the place where the work was carried on."

But we are not left to mere speculation as to what the courts hold. There is a later case from the Fourth Circuit which involved the original issues in the present case. This is the case of *United States Steel Co. v. Burkett, et al.*, 192 Fed. 2d 489, decided less than a year ago on November 5, 1951. Again we emphasize that this case is from the Fourth Circuit. That is the same Court that

decided the *Seese* case. In this *Burkett* case the Court of Appeals of the Fourth Circuit cited with approval and followed the *Conwell* case from this Eighth Circuit, that is, *Central Missouri Tel. Co. v. Conwell,* 170 Fed. 2d 641, and adopted exactly the same rule and followed exactly the same reasoning as did both the Trial Court and the majority opinion of the Court of Appeals in the present case. Furthermore, this Court of Appeals of the Fourth Circuit in this *Burkett* case specifically distinguishes between cases where the activities were of the nature involved in the present case, that is, substantially normal activities of the workday, on the one hand, and cases such as the *Seese* case and the *Battaglia* case in which the activities were strictly portal to portal in nature. In this *Burkett* case claim was made by foremen who were required by the employer to report one-half hour before the regular starting hour and to remain ten minutes after the regular quitting hour for the purpose of handing out slips and doing other tasks which were of the same nature as those performed during the regular portion of their workday. There was no contract, custom or practice to pay these foremen for these periods. The Trial Court found, of course, that there was the usual oral contract to pay them for actual time worked, including any overtime devoted to their regular duties or activities. The opinion cites numerous cases and covers the question fully. Therefore, and without going into more detail, we quote from the opinion the following rather lengthy excerpt because we are sure this is the settled law in all circuits where the point has been raised:

> "The overtime work which plaintiffs did was not a matter of reaching the place of work or of personal

preparation, but was normal work of the employer of the kind for which overtime compensation was provided by the contract of employment. With respect to this the District Judge found: '5. There was an express oral contract between the defendant and the plaintiff to pay the plaintiffs for any overtime which they worked as a part of their duties in the capacity in which they were employed, and the thirty minutes before the regular shift and the ten minute period after the regular shift were made compensable by an express contract when the plaintiffs were employed as turn foreman.'

"The District Judge held that upon these facts the plaintiffs were entitled to recover wages and overtime for the 40 minutes work done before and after their regular shifts and that they are not barred of recovery by reason of section 2 of the Portal-to-Portal Act, 29 U. S. C. A. No. 252. We think that this was clearly correct. We are in accord with what was said by the Court of Appeals of the Ninth Circuit in Biggs v. Joshua Hendy Corp., 183 F. 2d 515, 520, as follows: 'Cross-appellants further contend that work performed by appellants during lunch periods cannot be the basis for recovery under the Fair Labor Standards Act by reason of No. 2 of the Portal-to-Portal Act, 29 U. S. C. A., No. 252, because such work is not made compensable by the express provision of a contract within the meaning of No. 2(a) (1). That section is directed against claims for compensation for activities, such as dressing for work, traveling within the plant to the job location, etc., which are different from the activities which comprise the regular, normal part of the employment. The section has no application where, as here, the work for which compensation is being claimed is the same kind of work as was performed throughout the remainder of the workweek.'

"As was well said by Judge Rifkind in Galvin v. National Biscuit Co., D. C., 82 F. Supp. 535, 537:

'Neither contract nor custom can open an avenue of escape from the obligations imposed by the Fair Labor Standards Act, 29 U. S. C. A. No. 201 et seq. A contract may not validly dictate that eight hours work shall be calculated as seven hours.' See also Frank v. Wilson & Co., 7 Cir., 172 F. 2d 712; Joshua Henry Corp. v. Mills, 9 Cir., 169 F. 2d 898, 900; Smith v. Cleveland Pneumatic Tool Co., 6 Cir., 173 F. 2d 775; Michigan Window Cleaning Co. v. Martino, 6 Cir., 173 F. 2d 466; Central Missouri Tel. Co. v. Conwell, 8 Cir., 170 F. 2d 641, 645. As said by Judge Gardner in the case last cited:

" 'In the instant case there is no claim seeking to recover for time consumed in walking to work or other activities either before or after the normal working hours. Here the claim is that these employees actually worked many hours in excess of the forty hours permitted by the Fair Labor Standards Act, not for activities of a Portal-to-Portal nature, such as were involved in Anderson v. Mt. Clemens Pottery Company, supra (328 U. S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515), and we agree with the trial court that it was not the purpose of the Portal Act to destroy such claims.

" 'Section 207 of the Fair Labor Standards Act provides that, "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—* * * for a workweek longer than forty hours * * *, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.' "

" 'We are of the view that this provision of the Fair Labor Standards Act was neither repealed nor so modified as to make it necessary to plead, in an action to recover compensation for time actually de-

voted to the normal work for which the employee was employed, an express written contract or unwritten contract, or a practice or custom. Jackson v. Northwest Airlines, D. C. Minn., 76 F. Supp. 121. The court therefore had jurisdiction of the action and properly denied defendant's motion to dismiss.'

"There is nothing to the contrary in our decision in Seese v. Bethlehem Steel Co., 4 Cir., 168 F. 2d 58, 64. That case involved claims for time of changing clothes and walking to and from the place where work was carried on, not the doing of work of the employer of the very sort that the employees were hired and paid to perform. The holding of the case was that Congress had not violated the Constitution in denying recovery for 'claims of purely statutory origin, claims given by statute not as compensation for labor performed but as a means of regulating wages and hours of work in interstate commerce.' What we held to be stricken down by the Portal-to-Portal Act were 'claims * * * not based on contract, custom or practice.' There is nothing said in the case which would prevent recovery of wages or overtime compensation for work and labor performed as here in regular line of duty and under the regular contract of employment in excess of the hours permitted by the Fair Labor Standards Act."

This, we think, fully disposes of the claim of Petitioner that there is any conflict between this Eighth Circuit in this case and the *Conwell* case and either the Second or the Fourth Circuits. Let us turn then to the Ninth Circuit, in which jurisdiction Petitioner claims there is such conflict.

There is a fairly recent case from that circuit which is the latest word on the point in that circuit. This is the case of *Biggs, et al. v. Joshua Hendy Corporation,* 183 Fed. 2d 515. It will be observed that this Court of

Appeals of the Ninth Circuit in this last mentioned case cites, and we think correctly, as the basis for its holding, two of the opinions of this Court which Petitioner pretends to rely on for some support for its position. These are the cases of *Armour & Co. v. Wantock,* 323 U. S. 126, and *Skidmore v. Swift & Co.,* 323 U. S. 134. Following is the language of the Court in the above mentioned *Biggs* case:

> "Cross-appellants further contend that work performed by appellants during lunch periods cannot be the basis for recovery under the Fair Labor Standards Act by reason of No. 2 of the Portal-to-Portal Act, 29 U. S. C. A., No. 252, because such work is not made compensable by the express provision of a contract within the meaning of No. 2(a) (1). That section is directed against claims for compensation for activities, such as dressing for work, traveling within the plant to the job location, etc., which are different from the activities which comprise the regular, normal part of the employment. The section has no application where, as here, the work for which compensation is being claimed is the same kind of work as was performed throughout the remainder of the workweek.
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> "Appellee's final contention on cross-appeal is that there is insufficient evidence to support the finding of the trial court that appellant Biggs worked during all of his lunch periods. We think the evidence sustains the finding. He was on call at all times and time thus spent was compensable under the Fair Labor Standards Act. Armour & Co. v. Wantock, 1944, 323 U. S. 126, 65 S. Ct. 165, 89 L. Ed. 118; Skidmore v. Swift & Co., 1944, 323 U. S. 134, 65 S. Ct. 161, 89 L. Ed. 124."

We turn again to some more of the supposed authorities relied upon by Petitioner. Let us examine *Bauler*

v. Pressed Steel Car Co., 182 Fed. 2d 357, from the Seventh Circuit. Here again we must go back to the basic question of fact. That is the point of this entire proceeding. Once the facts are determined then the law is well settled and there is no conflict. The Trial Court and the majority opinion of the Court of Appeals in the present case determined the facts. We do not understand that it is the desire of this Court nor, in fact, usual recognized procedure to grant a writ of certiorari merely for the purpose of reviewing and redetermining a question of fact. Yet that is what Petitioner, in actual effect, is asking this Court to do in this present procedure.

Here again in this *Bauler* case as a matter of *fact*, the activities involved were portal to portal in nature and were not, as found and determined in the present case, the usual and ordinary activities of the regular workday of the employee concerned. The facts are summarized in the opinion in the following language:

> "The work for which they seek overtime compensation under the Fair Labor Standards Act consisted in marching to and from their respective posts of duty, in a military manner, changing their attire from civilian dress to guard uniforms, or from guard uniforms to civilian dress, cleaning their equipment and examining the bulletin board."

Boerkoel v. Hayes Manufacturing Company, 76 Fed. Supp. 771 (D. C. Michigan), is another supposed authority relied upon by Petitioner. This, as stated, is a District Court opinion. It is not clear from the opinion just what activities were involved. Therefore, the case can be of no help. But above and beyond that point we call at-

tention to a recent opinion of the Court of Appeals of that Sixth Circuit.

F. W. Stock & Sons, Inc. v. Thompson, 194 Fed. 2d 493, from that Sixth Circuit decided as late as February 7, 1952, fully and completely supports the position of Respondents in this proceeding. Far from there being any conflict, the Court of Appeals in this *Stock* case cites, approves and follows the above mentioned *Conwell* case from this Eighth Circuit and the *Biggs* case, also above cited and discussed. While the employees in this *Stock* case were not guards or firemen but rather engineers, yet their activities during a so-called lunch period were involved in much the same manner as in the present case. There again the Court of Appeals of the Sixth Circuit held that since during the so-called lunch period and notwithstanding orders and directives, the employee was, as a matter of fact, required to continue substantially his regular duties even while he ate a bit of lunch, it is not necessary to plead or prove a contract, custom or practice to treat such periods as compensable working time.

Turning again to the cases cited by Petitioner we find two State Court opinions, being those of *Cobb v. Aluminum Co. of America,* 226 S. W. 2d 110, and *Kemp v. Day & Zimmerman* (Iowa), 33 N. W. 2d 569. Neither of these cases as we read them give due consideration to the basic question as to the activities involved and whether or not these activities are those of the normal workday; that is, the activities which the employee was hired to perform. Furthermore, and with all due respect to these State Courts, we cannot see where these opinions, in any

event, enter into the present picture; that is, proceedings in connection with petition for writ of certiorari.

Next, let us examine Petitioner's supposed authority, *Jax Beer Co. v. Redfern,* 124 Fed. 2d 172. This case was decided December 10, 1941, or several years before the Portal to Portal Act was adopted. It could not possibly, therefore, be any authority on the real issues in the present proceeding. Petitioner apparently cites it in the way of grasping at a straw on the theory that this Court should review the facts in the present case. It is true that the Court of Appeals in this last mentioned case found that the evidence as to material facts was so uncertain as not to constitute substantial basis for the judgment. That was a proper point to be examined and determined by the Court of Appeals. But in the present case, not only the Trial Court but the Court of Appeals in the majority opinion has found that the evidence *clearly* established the fact that these employees during the so-called lunch period were engaged in performing the regular and normal activities of their employment. We do not understand that it is the policy of this Court under the law to review findings of fact so established.

Love v. United States Rubber Company (D. C. Pa.), 92 Fed. Supp. 174, cited by Petitioner is a two-platoon system case. We have discussed the situation in these cases earlier in this brief and will not repeat that discussion here. There just is nothing in this Love case that supports Petitioner's position.

Redwitz v. Ford Motor Co. (D. C. Ky.), 80 Fed. Supp. 265, is another of Petitioner's supposed authorities that just isn't any authority in this proceeding. There again

the only point actually presented, argued and decided was the constitutionality of the Portal to Portal Act. The case did not in any way involve the basic factual situation that we have in the present case.

Rokey v. Day & Zimmerman, Inc. (Eighth Circuit), 157 Fed. 2d 734, again is a two-platoon system case. Furthermore, this case was decided before the enactment of the Portal to Portal Act and could not possibly be of any help in the present case. Again it is a case from this same Eighth Circuit and has been properly and fully distinguished by the same Court.

Tipton v. Bearl Sprott Co., Inc. (Ninth Circuit), 175 Fed. 2d 432, is another case relied upon by Petitioner. The opinion does not disclose the nature of the activities involved. The question in that case was primarily whether or not the employees were engaged in the production of goods for commerce so as to come within the provisions of the Fair Labor Standards Act. There is a finding in the opinion that the plaintiffs there failed to allege a contract, custom or practice but without any discussion as to the activities involved. Later in the *Biggs case,* from that same Ninth Circuit, hereinabove cited and discussed, that Court had occasion to consider the precise questions involved in the present case and adopted and followed specifically the law as followed by the Court of Appeals in the present case and every other Court of Appeals opinion that we have been able to find wherein the present factual situation existed.

Welsh v. W. J. Dillner Transfer Co. (D. C. Pa.), 91 Fed. Supp. 685, again is a District Court opinion. The opinion fails to detail the activities involved so it is im-

possible to determine whether that court would have held as it did in a factual situation such as we have in the present case It is true that the district judge did not seem to agree with the law as laid down in the above discussed *Conwell* case. But every Court of Appeals in every circuit in the country in which the issue has been squarely presented has, so far as we can determine, followed explicitly the rule of law of this *Conwell* case.

Let us consider next the case of *Williams v. Jacksonville Terminal Co.*, 315 U. S. 386, cited and discussed by Petitioner beginning on page 48 of their Brief. This case apparently is cited in support of Petitioner's contention that the employees in the present case by continuing to work thereby entered into some sort of implied contract to work without pay during this half-hour lunch period. Surely this Court did not lay down any such rule in this Williams case. Here again, the factual situation and the issues involved were entirely different. Let us consider the facts in the present case for a moment. These present Plaintiffs and Respondents constituted practically the entire protection force of this vitally important war plant. They had a choice of continuing work under protest or going on strike. They did the former and declined to take the latter action. Remember this was in 1943 and most of 1944. It was a time when every moment counted. If these employees had gone on strike this entire plant would have been closed down right at the height of the war effort. This war plant could not operate for a moment without this protection. These employees were trained specialists. It would not have been possible to go out and secure other men and women to take their places without considerable training. We cannot conceive

of this or any other court in these circumstances holding that these or any other employees by remaining patriotically on the job under protest instead of going out on strike, thereby forfeited their lawful rights. We think nothing more need be said on this point.

Petitioner cites the Court of Appeals opinion in the Powell case, that is, *United States Cartridge Company v. Powell*, 185 Fed. 2d 67, following the disposition of that case in this Court in the opinion of this Court appearing at 339 U. S. 497. It is quite true that the Court of Appeals in that case made passing reference to a thirty-minute lunch period as being portal to portal in character. However, this statement was made in connection with the reference to activities "before the beginning of the regular shift." There is nothing in this Powell opinion at all contrary to the holding of the same Eighth Circuit Court in the present case when the factual situation is considered. This same Court of Appeals of the Eighth Circuit, both in the *Conwell* case and in the present case, just like the Court of Appeals in every other circuit where the point has been under consideration, has expressly held that when the activities of the employees during any so-called lunch period are, in fact, substantially those of the ordinary workday, then these activities are not portal to portal in character; and that it is not necessary to either plead or prove a contract, custom or practice of payment.

Finally on the points being discussed, Petitioner refers in its brief to the cases of *Armour & Company v. Wantock*, 323 U. S. 126, and *Skidmore v. Swift & Company*, 323 U. S. 134. We certainly find nothing in either

of these cases to support Petitioner's position either in this proceeding or upon the issues of this case in chief. On the contrary, both of these cases clearly support Respondents' position throughout. In the light of these two cases we can see nothing requiring the attention of this Court in the present case.

We quote briefly from the *Skidmore* case as follows:

> "Page 136. 'We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act *is a question of fact* to be resolved by appropriate findings of the trial court. (Emphasis added.)
>
> • • •
>
> " 'In general, the answer depends "upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work." Hours worked are not limited to the time spent in active labor but include time given by the employee to the employer.' "

We likewise quote from the above mentioned *Wantock* case, pages 132 and 133 of the opinion, as follows:

> " 'It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion.' "

Generally as to the rule applicable, the Court says:

> "Page 133. 'Of course an employer, if he chooses, may hire a man to do nothing or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a

stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case.' "

Petitioner in its petition and brief refers to the rule of "De Minimus Non Curat Lex." However, Petitioner cites no authority whatever to support any contention, if any, of Petitioner on this point. This we think is purely a matter within the discretion of the trial court in a case such as the present one. We respectfully direct the attention of the Court to the opinion of the Court of appeals in this case on this as well as other points involved. We also quote briefly from the opinion in a case from the Third Circuit where the amounts and general facts are somewhat similar. This is the case of *Landaas, et al. v. Canister Co., et al.,* 188 Fed. 2d 768. That Court in its opinion, page 771, had this to say:

"The employer makes another argument to the effect that the maxim 'de minimum non curat lex' should be applied here. The basis for this argument is that many of the employees have small claims. They run from $21.67 to $256.88. But it will be noted that the period involved to acquire this much of a claim is three years. The amount accruing for each day is, therefore, very small. The employer gets encouragement from certain words about trivial delays in the portal-to-portal case discussions.

"We think there is nothing to this point. It has been said that the maxim de minimus does not apply to money demands. Kennedy v. Gramling, 1890, 33

S. C. 367, 11 S. E. 1081, 1088. In any event, the maxim is based on common sense and practicalities. The consideration of plaintiffs' claims does not take the court into the realm of the picayune or hypertechnical."

In conclusion, we refer briefly to the specific "Reasons Relied on For Granting the Writ" appearing on page 21 of Petitioner's petition herein.

1. We have demonstrated above that beyond question the Courts of Appeal of the Fourth, Sixth and Ninth Circuits, as well as other holdings of our own Eighth Circuit, are in complete harmony with the holding and rules of law of the Court of Appeals in the present case. We have further demonstrated that there is in fact no authority, when the facts are considered, from any other circuit holding to the contrary. This is particularly true as to the Courts of Appeal of all other circuits. There just is no conflict.

2. No important questions of federal law were decided by the Court of Appeals which have not been or should be settled by this Court. The general rules have all been well settled by prior decisions of this Court as pointed out in the foregoing brief. Furthermore, in view of the uniform holding of all Courts of Appeal in every circuit in which the question has been actually presented, there is clearly nothing remaining requiring the present attention of this Court in this case.

3. There just are no decisions of this Court which in any manner conflict with the holding of the Court of Appeals in this case.

4. The holding of the Court of Appeals affirming the findings of fact of the Trial Court are supported by substantial evidence; and when this evidence is given full consideration these findings of fact not only are not erroneous but just could not be otherwise. Furthermore, Rule 52 of the Federal Rules of Civil Procedure and the many cases decided under this rule dispose of this contention of Petitioner.

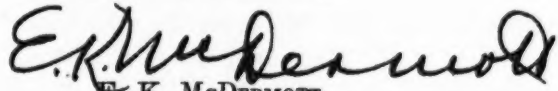
5. What is said in the next preceding paragraph applies equally to Petitioner's Proposition No. 5.

6. There is nothing in this case calling for the application of the rule of "De Minimus Non Curat Lex" and Petitioner cites no authorities supporting its position on this point.

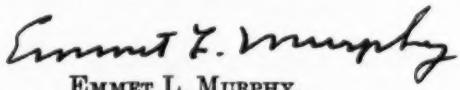
We earnestly suggest, therefore, as stated at the outset of this brief that there is nothing here calling for review by this Court. The whole matter reverts back to the basic determination of the questions of fact. The case was tried to the court without a jury. It was given long and careful study and consideration. The factual situation was determined by the Trial Court. This factual determination was approved by the Court of Appeals. No substantial reason is advanced by Petitioner as to why this Court should review these questions of fact. The questions of law depend upon this determination of the question of fact. When we keep in mind this situation we find that, far from there being any conflict among the Courts of Appeal of the various circuits or with any decisions of this Court, on the contrary, all applicable decisions are in complete uniformity.

Respondents, therefore, respectfully suggest that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



E. K. McDermott,



Emmet L. Murphy,

Attorneys for Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 326

THE GLENN L. MARTIN NEBRASKA COMPANY, a Corporation,

Petitioner

vs.

WRENN L. CULKIN, GLEN WEST, FRANCIS H. MASKER, and ALEX FEILMEYER, Individually and as Agents and Representatives to Maintain This Action for and in Behalf of All Employees Similarly Situated,

Respondents.

REPLY BRIEF OF PETITIONER

J. A. C. KENNEDY, Omaha, Nebraska,
GEORGE L. DELACY, Omaha, Nebraska,
LEO EISENSTATT, Omaha, Nebraska,
DONALD LEACH, Columbus, Ohio,
KENNEDY, HOLLAND, DELACY & SVOBODA,
Omaha, Nebraska,
Attorneys for Petitioner.

Law Briefs — OMAHA LINO-SLUG PRINTING CO. — 419 So. 15th St.

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Respondents.

REPLY BRIEF OF PETITIONER

If the Court Please:

In the above entitled case, four employees of The Glenn L. Martin Nebraska Company sued as agents and representatives of some 250 employees (207 Guards, 21 firemen, 26 both capacities) to recover overtime for alleged activities during thirty minute lunch periods allowed by the employer, the Petitioner. The periods in-

volved are from March 6, 1943, to September 17, 1944. Only the lunch periods are involved. The suit was brought under Section 16 of the Fair Labor Standards Act. Some twelve employees were produced by the plaintiffs as witnesses. They did not testify in detail as to any particular activities during their own lunch periods or the time consumed by any alleged activities, but sued for the whole thirty minute lunch period.

The Petitioner was engaged in the manufacture of bombing planes during the last war for the U. S. Army, and had some 13,000 or 14,000 persons employed at its plant near Omaha, Nebraska. The plant area was some 700 acres. The guards were stationed at definite posts around the perimeter of the area and within the various buildings. The guards were in three shifts. The Company had provided cafeterias which were available to their employees. The production employees and all employees other than guards and firemen were allowed an identical thirty minute lunch period and were allowed to go to the cafeterias and, of course, were not paid for their lunch period.

Up until March 6, 1943, the guards and firemen were on their posts from seven a. m. to three p. m.; three p. m. to eleven p. m.; eleven p. m. to seven a. m. They were not allowed to go to the cafeterias, and they were not allowed to leave their posts and they were paid for eight hours. On March 6, 1943, by special order and bulletin, it was provided that the first shift of guards should clock in at 6:45 a. m. They were to be on the post at seven a. m. They left their post at three p. m. and clocked out at 3:15 p. m. The schedules for the other two shifts corresponded.

The Bulletin, and order promulgated by the Bulletin, provided:

> "Guards will not be allowed to eat on their posts. They will be allowed thirty (30) minutes for lunch. The Rover in this case when on relief will check the Guard out and in during the lunch period. The Guards will be allowed to eat in the Cafeteria during the lunch period."

The Lower Court found (Printed Record, p. 64) that the employees knew of this order, and knew that they were not to be paid for the thirty minute lunch period.

The Lower Court found there was no contract to pay the guards or firemen for this thirty minute lunch period.

The Lower Court did not find that there was any custom or practice to pay for this lunch period within the meaning of the Portal-to-Portal Act.

The Lower Court, while admitting that there was a diversity of opinion on the subject, held, and this was affirmed by the Circuit Court of Appeals, as follows:

> "This being so, the court has concluded that Section 2 of the Portal Act is inapplicable to this case and that the plaintiffs are not required to plead and prove a contract, custom or practice to compensate them for the hours worked during the lunch period."

The Court of Appeals held the case fell within the rule laid down in the *Central Missouri Telephone Company* case, 170 Fed. (2d) 641.

As heretofore indicated, this suit was brought by four plaintiffs. Glen West was one of them. He testified

(R., page 143) that after March 6th that the guards were permitted to go to lunch to the cafeterias, and were permitted thirty minutes. He testified that that order was posted on a bulletin, and he understood that they were not to be paid for that thirty minutes. His exact testimony is quoted on page 54 of our original Brief.

These guards, as has been said before, were stationed at various posts. At some of the posts there were three or four guards so that they could relieve each other when it came to the lunch period. Every morning the lunch period allowed each guard was posted up. If the guard was to be relieved by a rover or other guard, that fact was included in the bulletin.

It is apparent that if there were three or four guards at a post, one could remain while the others went to lunch. The guards at some of the posts could leave their posts without being watched, and could go to the cafeteria. Some of the guards who were stationed at posts a considerable distance from the cafeterias were relieved by rovers or other employees driving out with jeeps and they were allowed to drive to the cafeteria. There is no dispute in the record as to these facts.

The Lower Court in its Finding of Fact, on page 61 of the Printed Record, found:

> "The system was essentially this: Every day the Company would post a bulletin assigning each guard to a particular post and assign someone to relieve each guard for lunch at a certain time. For the purpose of clarity a representative bulletin has been set forth in the margin. An examination of these bulletins

shows that in many instances a guard would be directed to relieve himself; in other instances a guard would be required to relieve others; and in still other instances, 'Rovers' were assigned to relieve guards for lunch. 'Rovers' were guards whose only duty was to relieve other guards."

In Petitioner's original Brief, commencing on page 54 and running to page 61, there are quotations from the testimony of the plaintiffs' witnesses. These quotations show that after March 6, 1943, the guards were assigned lunch periods. This assignment was posted up every morning in a bulletin, the same bulletin indicated by whom they were to be relieved, and they were allowed to go to the cafeteria, and they did go to the cafeteria.

The plaintiffs alleged in their original Complaint, as follows (Printed Record, page 4):

> "that between the dates of March sixth, 1943, and September sixteenth, 1944, said guards were permitted to leave their posts for a period of thirty minutes each day to enable them to walk to the cafeteria to secure food. * * *"

The undisputed evidence shows that the guards did not take their food out; they ate their food in the various cafeterias. The claim made in the Complaint was that the guards were required while on their way to the cafeteria and while at the cafeteria to "guard the property to ascertain if intruders or strangers were on the premises and were subject to call for any emergency" (Record, pages 4 and 5).

As to the firemen, it was alleged that during the same period they were allowed to go to the cafeteria to secure food, bring the same back to their station and eat.

It was alleged that they were required to be "on the alert for fire duty and were not relieved for any meal hour and were required to be on duty as herein described" (Record, page 6). There were only a few firemen stationed at the firehouse, three or four of them. The other firemen were out on the crash truck for periods of time and were on inspection in the various buildings. These firemen out on inspection went to the cafeterias and ate their lunch at the cafeterias just as the guards did. The plaintiffs introduced testimony to the effect that on occasions very rare indeed the lunch period of a few guards was interrupted, and that they were called to the phone.

The evidence shows that the regular duties of the guards consisted of being stationed at their posts, checking people desiring to come into the plant, checking automobiles, keeping a certain record of it, and generally acting as guards, watching for sabotage and so forth during the war.

The claim was that when they were walking to the cafeteria, they checked badges, and while in the cafeteria they were sometimes called to the phone. No guard testified to more than three or four such episodes, and the Lower Court in its Finding of Fact (Printed Record, pages 62 and 63) found that the instances where a guard was required to take any affirmative action were not relatively great, but the Court held that the fact that the guards were fully uniformed was a deterrent to lawlessness, and was necessarily beneficial to the defendant.

As to the firemen, the Court stated (Printed Record, page 62) that the instances in which affirmative action was required were relatively few, saying that it was nonethe-

less apparent that the firemen were required to be constantly vigilant.

The Circuit Court of Appeals stated that the nature of the activities during the lunch period was to a considerable extent a standby capacity (Additional Record, page 11).

It should be remembered that Section 2, Part II of the Portal-to-Portal Act of 1947 uses these words:

> "No employer shall be subject to any liability • • • under the Fair Labor Standards Act of 1938 as Amended • • • on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either"—
>
> "(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or
>
> "(2) A custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-barganing representative and his employer."

The Lower Court and the Court of Appeals came to the conclusion that this Section 2, above-quoted, did not apply unless the work involved was in the nature of preliminary or postliminary work, that is, dressing, going to and from work, and so forth; that it did not apply to employees' regular activities. Part II of the

Portal-to-Portal Act, quoted above, applies to existing claims, that is, for work done before the passage of the Portal-to-Portal Act of 1947. The work involved in the case at bar was from March, 1943, to September, 1944.

The Court will remember that Section 4 of Part III of the Act has to do with future claims, and has to do with claims for activities occurring after the enactment of the Portal-to-Portal Act.

This Section 4 describes the activities which are preliminary or postliminary to the principal activity, *but Section 2 of Part II applies to any* activities.

It is the claim of the Petitioner that before there can be any recovery in the case at bar for these alleged activities during the lunch period, there would have to be established a contract or a custom to pay for them within the meaning of the Portal-to-Portal Act. The Petitioner for Certiorari also asserts that there is a diversity of holdings on this point in the various circuits.

The Lower Court was of the opinion that there was such a diversity of opinion, for the Court said in the opinion on page 674, 97 Fed. Supp.:

> "• • • Counsel for the plaintiff, on the other hand, strenuously urges that, since the activities engaged in during the lunch period were part of the day's principal activities and not preliminary or postliminary in character, Section 2 of the Portal to Portal Act does not apply. Though there is some authority to the contrary in other circuits,[36] the view adopted in our own circuit seems to be in accordance with that suggested by counsel for the plaintiffs."

In the footnote 36, he lists the contra cases as follows:

Seese v. Bethlehem Steel Co. (D. C. Md), 74 F. Supp. 412; *Welsh v. Dillner Transfer Co.* (D. C. Penn., 1950), reported in Commerce Clearing House Labor cases, Vol. 18, Sec. 65, 896. *Amelbo v. Penn Salt Manufacturing Company* (D. C. Penn., 1949), 83 F. Supp. 456; *Shaivety v. Laks, et al.* (D. C. N. Y., 1948), 80 F. Supp. 241.

The Court of Appeals in this case concluded:

"• • • Section 2 of the Portal Act is inapplicable to this case and that the plaintiffs are not required to plead and prove a contract, custom or practice to compensate them for the hours worked during the lunch period."

The opinion of the Court of Appeals is to the effect that in a suit brought under Section 16 of the Fair Labor Standards Act to recover for overtime under that Act, the Portal-to-Portal Act of 1947 does not apply unless the activities were preliminary or postliminary in character. The Court held that for the claimed activities during the lunch period, a recovery could be had under the Fair Labor Standards Act, and that Section 2 of the Portal-to-Portal Act did not apply even though the activities were prior to the passage of the Portal-to-Portal Act in May, 1947. As we have said before, we believe the weight of authority in the Country is to the contrary and that other circuits have held to the contrary. In addition to the cases cited in the District Court's opinion in Note 36, we again call attention to the case of *Battaglia v. General Motors Corporation,* 169 Fed. (2d) 254, which certainly is to the contrary (also the other cases cited in our original brief). This cited case involved activities during *lunch periods and rest periods.* As we have said before, the Court of Appeals and the Lower Court were of the opinion that the *Central Missouri Telephone* case, 170 Fed. (2d) 641, was decisive.

Central Missouri Telephone Company v. Conwell, 170 F. (2d) 641

Various courts have commented on this Telephone case. For instance, in the case of *Welsh v. W. J. Dillner Transfer Co.*, 91 Fed. Supp. 685, the Court said, "the plaintiffs have substantial authority for their position, *Central Missouri Telephone Company vs. Conwell*, 170 Fed. (2d) 641." *On the other hand, the weight of authority appears to be that Section 2 of the Portal-to-Portal Act applies to all claims for overtime.*

In our original brief we cited annotations from 3 A. L. R. (2), p. 1129, and 21 A. L. R. (2), p. 1337. These annotations dealt with the question of whether or not Section 2 of Part II of the Portal-to-Portal Act of 1947 was limited to Portal-to-Portal activities.

We wish to discuss this Conwell case and the background leading up to question involved.

Congress was well aware of this situation when it debated the Portal-to-Portal Act. *Anderson v. Mt. Clemens Pottery Company*, 328 U. S. 680, was merely the precipitating cause of that legislation, and when Congress declared in Section 1 that the FLSA "Has been interpreted judicially in disregard of long-established customs, practices and contracts between employers and employees," it referred to the entire course of interpretation. In Section 10, Congress made liquidated damages no longer mandatory, and in Section 3, it permitted compromises under proper safe-guards, undoing the injustices perpetrated by *Overnight Motor Transportation Co., Inc. v. Missel*, 316 U. S. 572, and *D. A. Schulte, Inc. v. Gangi*, 328 U. S. 108. In Section 8, Congress provided that good faith reliance on administrative rulings and interpretations should constitute a defense to the

employer, contrary to the holding in *Jewell Ridge Coal Corp. v. United Mine Workers,* 325 U. S. 161. In Section 4, so far as the *prospective* operation of the FLSA was concerned, Congress accepted in other respects the interpretations of the Supreme Court, except as to the travel time and preliminary and postliminary activities which were considered "work" in the *Tennessee Coal, Jewell Ridge* and *Mt. Clemens Pottery* cases. In Section 2, however, dealing with *existing claims,* it carefully chose language appropriate to wipe the slate clean and give employers a fresh start in their efforts to comply with the Act. In Section 5 Congress emphasized this policy by putting a short period of limitations on existing claims which could be shown to be founded on contract or custom.

No one can doubt after reading the debate in the Senate that Congress knew exactly what it was doing and intended to bar *all* existing claims, unless founded on contract or custom, and not merely the portal-to-portal type of claim. Senator Aiken raised the question even before Senator Donnell, who had charge of the bill on the floor, commenced his presentation of the bill itself. He said (93 Cong. Rec. p. 2098):

> "There must be a good many times when legitimate suits are brought for back pay. Is the bill going to outlaw the nuisance suits and still make it permissible to bring legitimate suits?"

Senator Donnell, in reply, admitted that the bill might result in some injustice, and that a plaintiff who had failed to collect regular overtime pay due him in the past, would have to show, in order to collect it through the courts, "either that he had a contract or that there was a customary practice in the plant or other place of work in

which he was employed, entitling him to such compensation."

In reply to a question by Senator Lodge, whether the bill did not "run to things other than portal-to-portal matters," Senator Donnell replied that it did (93 Con. Rec., p. 2113).

The following exchange between Senator Lucas and Senator Donnell (93 Cong. Rec., p. 2123) is relevant:

> "MR. LUCAS. I wish to ask the Senator about the bill as it had been reported by the committee, and I have specific reference to section 2 (a) of Part II. I ask him whether he believes that every conceivable claim based on any activity not compensable by contract or custom or practice, is wiped out by the bill. I am now talking about all claims, over and beyond those which are set forth in the portal-to-portal suits, and I wish to know whether the bill included such claims.
>
> MR. DONNELLL. The answer, Mr. President, is that the section to which the Senator from Illinois has referred destroys every claim * * * except those that were compensable by either contract, custom, or practice, as described in that section.
>
> MR. LUCAS. Then the Senator from Missouri and I are in agreement as to what this section means. In other words, any and all claims, over and above and beyond anything that has happened in these portal-to-portal suits, are also wiped out or outlawed, so to speak.
>
> If my position is correct in that respect, I wish to make this further statement for the record: namely, that the section we are discussing contains no definition of portal-to-portal claims, and makes no distinction between suits based on out-and-out violations of the Fair Labor Standards Act * * * and the portal-to-portal suits."

Senator Donnell, explaining the difficulties encountered in drafting the bill, had this to say (93 Cong. Rec., p. 2132):

"Finally we came to the conclusion * * * that instead of making our bill apply to the 24 hour period, around the clock, we would make it apply only to the period preceding the beginning of the normal workday and subsequent to the end of the normal workday—what might be termed the whistle-to-whistle period. So we started to make all activities prior to the beginning of the workday compensable only if so under a contract or custom, and to make all activities after the conclusion of the workday compensable only if so under contract or custom, leaving the broad field of the workday itself, the great bulk of the time, with no new legislation applicable to it * * *.

"Then we were confronted by these considerations * * * that if we should not legislate with reference to the shift period, that is to say, between whistle and whistle, we would still leave unattained our object to wipe out the portal-to-portal suits. For illustration, in connection with lunch time, as I remember it, it was alleged in the Mt. Clemens case by the employees that they were entitled to compensation from the time they left their work places to the time they reached the cafeteria, and for the time spent in returning * * *. If we adopted the plan of legislating as to existing claims merely with respect to activities before the beginning of the workday and after the end of the workday, in all probability there would still be left pending in the courts a great mass of suits * * *.

"I have gone into this subject at great length because I think it is exceedingly important as showing that Congress, when it legislates to affect the rights of persons other than those who have engaged in portal-to-portal activities and to affect rights other than those accruing from Portal-to-Portal activities, is not acting capriciously or arbitrarily, but within

its sound discretion is using what the Congress deems to be the best practical approach to demolishing the portal-to-portal cases."

Senator Lucas again raised the point that Section 2 (a) wiped out "every conceivable claim based on any activity not compensable by contract, custom or practice," and this time Senator Ferguson answered him as follows (Cong. Rec., p. 2234):

> "I answer by saying that it is the intent of the section referred to to abolish every known claim that could exist under the Fair Labor Standards Act, the Walsh-Healy Act, or the Bacon-Davis Act—specifically under the acts and by virtue of nothing else than the acts—except claims which may arise under any express or implied contract * * * I think it was the intention of the drafters of the legislation to wipe out everything under those acts that was not based upon contract or custom or practice. That was the intention."

Senator McCarran, launching a bitter attack on the bill, said (93 Cong. Rep., p. 2244):

> "The worst feature of the majority bill is that it thoroughly emasculates the Fair Labor Standards Act, not only with respect to portal-to-portal claims, and not only with respect to all past claims, but also with respect to future claims."

Senator McGrath, also opposed, had this to say (93 Cong. Rec., p. 2248):

> "Why do I say that? Because the committee itself admits that under the language of the bill many inequities are possible. The committee itself admits that in trying to write an over-all rule for the conduct of American business, involving the so-called workday and workweek, we are probably ruling out the valid claims of many American workingmen so that they shall no longer have a forum in which

> they can press their claims regardless of how right they may be or how just they may be or how unjust or cruel the employer. By this bill we give forgiveness of the sins of the many employers who have abused their workers, and we place a premium on that kind of action at the expense of the vast majority of American Employers who have been loyal and fair in dealing with their workers."

When *Central Missouri Telephone Co. v. Conwell,* supra, was in the District Court on motion to dismiss, 74 F. Supp. 542, Judge Duncan had before him the debate in the Senate and noted that apparently "it was the intention of the Congress to wipe out every existing claim except those that had arisen under contract, written or unwritten, express or implied, or pursuant to custom or practice." The he seized upon the term "implied contract," used by Senator Ferguson in replying to Senator Lucas but not found in the Act, and proceeded to imply a contract from the fact that the plaintiffs had worked many hours of overtime without being paid in accordance with the FLSA. He argued in support of this implied contract only that an arrangement under which overtime work was performed without payment was illegal and not binding on the employee. Even Judge Duncan's sense of logic balked at stating the naked syllogism. Major premise: a contract for overtime work without payment is illegal. Minor premise: the parties are not bound by an illegal contract. Conclusion: Therefore a contract to pay for overtime work is implied.

The court made short work of the same argument in *Newsom v. E. I. Dupont de Nemours & Co.,* 173 F. (2d) 856, 860. There a written contract provided that "time and one-half or double time will be paid when required by law or Government regulation," thus incorporating the

FLSA by express reference, and not merely by implication. As the Court pointed out, however, one purpose of the Portal-to-Portal Act was to repeal the Supreme Court's interpretation of the FLSA as to what activities constituted "work." To read the FLSA into the contract between the parties, including the Supreme Court's interpretation of that Act, "would nullify both the purpose and the provisions of the Portal-to-Portal Act." It is obvious, of course, that Judge Duncan's device of implying a contract to pay for overtime work in accordance with the FLSA, carried to its logical conclusion, would absolutely nullify the Portal-to-Portal Act in every case.

When *Central Missouri Telephone Co. v. Conwell* reached the Court of Appeals, 170 F. (2d) 641, the judges of that court agreed with Judge Duncan, and cited in support of his conclusion an interpretative bulletin of the Administrator of the Wage and Hour Division of the Department of Labor and the remarks of President Truman on the occasion of signing the Portal-to-Portal Act. The Administrator quoted the sponsors of the Act as saying that it "protects the legitimate claims," and therefore concluded that Congress did not intend to change the general rule that the remedial provisions of the Fair Labor Standards Act should be liberally construed and exemptions therefrom narrowly construed. The President said that he was "confident that the purpose of the main provisions of the Act is to eliminate the immense potential liabilities which have arisen as a result of the 'portal-to-portal' claims," and that it was "not the purpose of the Act to permit violation of our fundamental wage and hour standards or to allow a lowering of those standards.

—

It is undisputed that in the case at bar, whatever activity or requirement of availability there may have been during the lunch periods involved, the claimants did not expect to be paid for their lunch periods. They knew that the lunch periods were not to be paid for.

In Section 1 (a) (4) of the Portal-to-Portal Act, Congress found that one of the evils of the FLSA, as interpreted by the Supreme Court, was that "employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay," and in Section 1 (a) (5) Congress found that if the FLSA were permitted to stand as interpreted, it would promote "increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in." These and other evils were found to burden and obstruct commerce, and in Section 1 (b) Congress declared its policy "to relieve and protect commerce from practices which burden and obstruct it * * *."

The Court will remember that Section 2 of the Portal-to-Portal Act provides that there should be no liability for *"any"* activity engaged in prior to the date of the enactment of the Act, except activities compensable by either (1) an *express* provision of *a written or non-written contract,* in effect at the time of such activity between such employee, his agent, or collective bargaining representative and his employer."

In the case at bar the Lower Court found that:

"The Company stopped paying for activities engaged in during the lunch period and the employees

continued to work with the knowledge that they were not being paid for this time." (Printed Record, page 64.)

One of the plaintiffs, Glen E. West, testified as follows:

"Q. After March 6, 1943, you were permitted to go to lunch at the Cafeteria and permitted thirty minutes? A. That was right.

Q. That was posted as a bulletin? A. Yes.

Q. Of course, you weren't to be paid for that thirty minutes, you understand that?

A. That is right." (Printed Record, page 143.)

In addition, Respondents in their brief herein in referring to the testimony of Alex Feilmeyer (page 15 of Respondent's brief) say:

> "The men through an organization were making complaints about the fact that our pay was not being based on eight and one-half hours. I never did agree with Martin or any one else that I was entitled to only eight hours pay for that period of time."

Again in the brief it is stated that complaints were made by the employees about not receiving pay for the thirty minute lunch period, and that these complaints continued until September, 1944, when a different arrangement was made.

It is apparent that in this case there was not any contract, express or implied, to pay the men for the lunch period. As a matter of fact, they understood they were not being paid for the lunch period and claimed that through their organizations they objected.

The record discloses that in *September, 1944*, the following Bulletin was posted, being Exhibit 38, Printed Record, pages 120 and 121:

> "To All Guards and Firemen from L. H. Krumm, Guards Eating Lunch on their Post. Effective with the second shift September 17, 1944, it will be required that all men eat their lunch on their post of duty, and not go to the cafeteria to eat lunch. No deduction shall be made thereafter for the usual lunch period.
>
> L. H. Krumm."

During the period involved from March 6, 1943, until September 17, 1944, there was a directive to the timekeeping department which read at follows:

> "All guards will be allowed thirty minutes lunch period, the lunch period is to be deducted from the time shown on the time card.
>
> "This will mean that all guards will have eight and one-half hours shown on their time cards, but will be credited with eight hours only."

Again the Court in his Findings of Fact found as follows (see Printed Record, page 64):

> "The plaintiffs have alleged that the activities engaged in during the lunch period were compensable throughout the period in question 'under the general non-written contract in effect between defendant and each of said employees.' The evidence, however, does not support this allegation; consequently, the court is unable to find that the activities were compensable by contract."

Your Petitioner again submits to the Court that both the Lower Court and the Court of Appeals erred in coming to the conclusion that Section 2 of the Portal-to-Portal Act did not apply.

In Respondents' Brief appears the following language:

> "It is conceivable that a situation might arise in which the activities involved were not exactly portal to portal in character and yet were not the normal activities of the regular workday. In such a situation perhaps it is necessary under Section 2 of the Portal to Portal Act to clearly and specifically plead and prove such contract, custom or practice, but that is not the situation here."

The Court's findings as herein set out indicate the regular activities of the guards. The claimed and alleged activities during the lunch period are certainly different from the regular activities as found by the Court. We, therefore, submit that under any view of the case, the plaintiffs were required to prove either a contract or a custom as required by Section 2 of the Portal-to-Portal Act.

REPLY TO COMMENTS ON FACTS BY RESPONDENTS

We do not believe that the comments as to the facts made in Respondents' Brief are accurate. In the Lower Court's Opinion as hereinbefore quoted, he set forth on page 61 of the Printed Record the practice in re the thirty minute lunch periods. On page 11 of Respondents' Brief it is said:

> "When any witnesses in answer to questions upon cross examination made any statement to the effect that they could have a half hour lunch period, etc., they were referring to the specific paper directive."

The record does not at all support this statement. For instance, one of the plaintiffs, Alex Feilmeyer, on page 131 of the record testified as follows:

"Q. When you did go to a cafeteria to eat, did you have full half hour at any time? (This was a question propounded by Mr. Murphy, Counsel for the plaintiff)

A. If you weren't called away, yes you would have your half hour."

This witness also testified as follows:

"Then after this March 6, 1943, you were permitted to go to the cafeteria? A. Yes.

Q. And you would go, of course, to the Cafeteria that was nearest you at Modification? A. Yes."

Again he testified:

"Q. When it came to lunch, you were again relieved by a Rover and went to the cafeteria? A. Yes.

Q. And you were allowed thirty minutes for this lunch? (Record, pages 132, 133 and 134).

A. Yes."

Angeline E. Way

She was called as a witness by the plaintiff and testified:

"Q. You knew after you came to work you were entitled to thirty minutes to go to lunch to a cafeteria? A. That is right.

• • •

Q. If you wanted to you could sit in the Cafeteria the whole thirty minutes?

A. That is right, if you weren't called.

• • •

Q. During all the time you were employed there, you were called out of the lunch period twice?

A. That is right." (Record, pages 146, 147.)

William A. Keefer

He was called as a witness for the plaintiff and testified:

"A. Yes, I think after March 6, 1943, we were permitted to be relieved by a Rover and to eat in the Cafeteria. (Record, page 124.)

Q. Do you remember when you were a guard of ever being called when you were at lunch in the Cafeteria? A. Called away from the cafeteria?

Q. Yes.

A. No, I can't remember of any instance." (Record, pages 127, 128.)

The record discloses that these guards and firemen during their shift period were allowed two rest periods of ten minutes. These rest periods were not deducted from their time (Record, page 126).

Mr. Murphy in the trial of the case was attempting to prove that while they were at lunch the claimants were interrupted at times, and called away. But as said before, during the eighteen months involved no one of them was called away more than two or three times. Surely the activity of the guard seated at lunch and eating his lunch in a cafeteria, provided by his employer, is different in character from the guard's activities when he is at his post checking automobiles and persons in and out of the plant, checking railroad cars, and generally doing other guard duties. The Lower Court and the Circuit Court of Appeals attempted to avoid the consequences of the Portal-to-Portal Act by asserting that the guards were doing their regular work because of the fact that while eating their lunch in the cafeteria they had their complete uniforms on. The plaintiffs tried to prove that

they had some duties as to checking badges while on their way to the cafeteria or entering the cafeteria, but this faded away and there was a lack of evidence to establish any such activities. One of the witnesses testified that on one occasion he checked a badge. The truth is, and the record without dispute establishes it, that after March 6, 1943, and until September 16, 1944, the guards could go to the cafeteria for their lunch, were relieved so that they could do so, and those who were stationed at distant posts were transported to the cafeteria. They availed themselves of this period. There was no contract or custom to pay them for this thirty minute period. The record discloses an attempt on the part of some twelve claimants to try to establish that the guards or firemen performed some activities during this thirty minute lunch period. However, the attempts were so feeble that on cross-examination it was established that only on the very rarest occasions while the guards were at lunch was their lunch interfered with. This also is true as to the firemen. For the information of the Court we advise that there were 207 claimants who were guards and 21 who were firemen, and 26 who served in both capacities.

On page 247 of the Printed Record the Court took over the examination of a witness by the name of Al Wolf. The following questions were asked by the Court, also the answers of the witness:

> "Q. Likewise it is true that this order of March 6, 1943, the guards had thirty minutes in which to eat their lunches, it was made available to them and they could go to the cafeteria and if they were disturbed they took it at another time if they cared to? A. Yes.
>
> Q. And there isn't any doubt about that? A. No, sir."

We call attention of the Court to the Printed Record commencing on page 183. This is a photostatic copy of the Daily Report made by the Production Department (pages 183 to 201) covering the guards. The Fire Department report appears on pages 202, 203, 204, and on page 208 appears the assignment of the firemen to their various duties. On page 185 of the Printed Record appears a copy of the bulletin showing the assignment of the various guards to their various posts and lunch reliefs and by whom they were to be relieved.

It appears that in September, 1944, the entire plant voted to go on a two shift schedule of nine hours each, instead of the three shift schedule so that the welders and other workers might have a little more take home pay (Record, pages 165-166). The evidence is that in order to give the guards and firemen some additional take home pay, it was agreed effective September 16, 1944, that they would again eat their lunch on their post and not go to the cafeteria and for this period they would be paid and they would be paid for eight and one-half hours (Record, pages 166, 167). Again the approval of the Air Corps was obtained for this change. The letter approving the change appeared on page 176 of the printed Record. The pertinent part of the letter is as follows (Record, page 167):

> "I. Consideration has been given to the proposal contained in referenced letter regarding the contractor's desire to allow plant protection guards to eat their lunch at their posts during their tour of duty in order to eliminate the necessity for relief guards to replace such personnel while on a regularly scheduled lunch period.
>
> "2. The undersigned approves the above mentioned procedure with the provision that the guards

will not be allowed to leave their posts to eat lunch at any of the eating facilities in operation at the premises, that they be required to have lunch at their regular station of duty. This procedure to become effective on and after 17 September, 1944.

"For the A. A. F. Representative: J. T. Reymonds, 1st Lt., Air Corps Contracting Officer."

"The testimony of Mr. Robert L. Evans, who was the personnel director of the defendant, is that he took up the matter with the unions representing the guards and firemen and made this change so that the guards and firemen could likewise have some increase in take-home pay to correspond with current increases available to all the other employees." (Record, page 166.)

As to the duty of the guards the Lower Court in its Finding of Fact held (see page 60 of the Printed Record):

"The primary function of a guard, irrespective of his particular station at the plant, involved constant vigilance for the security of the defendant's property. Each guard, however, had certain specific duties, routine in character, which were, in a sense at least, related to the individual post, e. g. the guards at the main gate were required to examine the credentials of all persons seeking admittance to the plant; the guard at the water tower was required to take a water reading every twenty minutes; and the guard on freight inspection duty was required to check incoming carloads of freight."

The Court likewise in its Finding of Fact held:

"when the guards were relieved for lunch they could go either to the nearest cafeteria or to the smoking area." (Printed Record, page 62.)

As has been said before, the Lower Court held there was no contract to pay either the guards or firemen for

their lunch period. This appears on page 64 of the Printed Record. The Lower Court likewise found the following fact:

> "the Company stopped paying for activities engaged in during the lunch period and the employees continued to work with the knowledge that they were not being paid for this time." (page 64.)

Your Petitioner again asserts that the Lower Court's findings that the claimants were performing their ordinary work during the lunch period was clearly erroneous within the meaning of Rule 52 of the Federal Rules of Procedure.

CONCLUSION

For the reasons set forth in this Brief and the reasons set forth in our original Brief, Petitioner respectfully prays for a Writ of Certiorari to the Court of Appeals for the Eighth Circuit to review the decision of that Court in the above entitled case.

Respectfully submitted

J. A. C. Kennedy,
George L. DeLacy,
Leo Eisenstatt,
Omaha, Nebraska,

Donald Leach,
Columbus, Ohio,
Attorneys for Petitioner.

Office - Supreme Court, U.
FILED
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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 326

THE GLENN L. MARTIN NEBRASKA COMPANY, a Corporation,

Petitioner,

vs.

WREN L. CULKIN, GLEN WEST, FRANCIS H. MASKER, and ALEX FEILMEYER, Individually and as Agents and Representatives to Maintain This Action for and in Behalf of All Employees Similarly Situated,

Respondents.

PETITION FOR REHEARING

J. A. C. Kennedy, Omaha, Nebraska,
George L. DeLacy, Omaha, Nebraska,
Leo Eisenstatt, Omaha, Nebraska,
Donald Leach, Columbus, Ohio,
Kennedy, Holland, DeLacy & Svoboda,
Omaha, Nebraska,
Attorneys for Petitioner.

Law Brief — OMAHA LINO-SLUG PRINTING CO. — 413 So. 18th St.

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Respondents.

PETITION FOR REHEARING

Your Petitioner, The Glenn L. Martin Nebraska Company, a corporation, prays for a rehearing of the order of this Court dated October 27, 1952, denying its Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BASIC FACTS

This is an action brought by four employees of The Glenn L. Martin Nebraska Company, as agents and repsentatives of 207 guards and 21 firemen and 26 others

who had served in both capacities to recover overtime and liquidated damages under Section 16 of the Fair Labor Standards Act. There were some 13,000 or 14,000 employees at this plant where bombers were made during the last war. The date involved is from March 16, 1943, to September 16, 1944. The claim is for payment for a thirty minute lunch period which was allowed to the guards under an order and bulletin dated March 6, 1943, which provided that after that date the guards would have a thirty minute lunch period, would have their lunch at the cafeterias, and would be relieved where relief was necessary. There is no dispute but that the guards were allowed this thirty minute lunch period; that some of them were transported to the cafeterias. The claim was made that during the lunch period, they wore their uniforms and that they acted in a standby capacity.

The defense raised was that under Section 2 of the Portal-to-Portal Act of 1947, there was no contract or custom as required by the Portal-to-Portal Act.

The Lower Court, as a Finding of Fact, found that there was no contract; found that the guards and firemen knew that they were not being paid for the thirty minute lunch period. The Court did not find that there was any custom, but the Court found that there was no need to plead a contract or custom under the Portal-to-Portal Act of 1947, this because the Lower Court found that the activities performed during the lunch period were not preliminary or postliminary.

The Court relied upon the case of *Central Missouri Telephone Company vs. Conwell,* 170 Fed. (2d) 641.

ARGUMENT

Petitioner assigns the following reason for granting this Petition—

There is a conflict in the decisions of the various circuits, as to whether or not it is necessary to plead and prove a contract or custom to pay in accordance with Section 2 of the Portal-to-Portal Act of 1947. That there was such a conflict was found by the Lower Court, the Lower Court saying in its opinion—

> "* * * Counsel for the plaintiff, on the other hand, strenuously urges that, since the activities engaged in during the lunch period were part of the day's principal activities and not preliminary or posliminary in character, Section 2 of the Portal to Portal Act does not apply. Though there is some authority to the contrary in other circuits,[36] the view adopted in our own circuit seems to be in accordance with that suggested by counsel for the plaintiffs."

In the footnote 36, he lists the contra cases as follows:

> "*Seese v. Bethlehem Steel Co.* (D. C. Md.), 74 F. Supp. 412; *Welsh v. Dillner Transfer Co.* (D. C. Penn., 1950), reported in Commerce Clearing House Labor cases, Vol. 18, Sec. 65,896. *Amelbo v. Penn Salt Manufacturing Company* (D. C. Penn., 1949), 83 F. Supp. 456; *Shaivety v. Laks, et al.* (D. C. N. Y., 1948), 80 F. Supp. 241."

Your Petitioner prepared a Reply Brief in answer to Respondents' Brief in Opposition to a Petition for Writ of Certiorari. This Brief set forth the comments of the Lower Court to the effect that there was a diversity of holding and contained a complete analysis of the *Central Missouri Telephone Company v. Conwell* case, supra,

and contained quotations from the Congressional Record, showing the debate which was carried on in the United States Senate relative to the meaning of Section 2 of the Portal-to-Portal Act, which debate is set forth in your Petitioner's Reply Brief; that said Reply Brief was prepared in accordance with the rules of this Court, was served upon counsel for the Respondents, and was forwarded to this Court for filing. However, because of the delay in transportation, this Reply Brief arrived in Washington and in the Clerk's office on October 28th, 1952, the day after the order of this Court denying certiorari.

We believe that a reading of this Reply Brief would have convinced the Court that both the Lower Court and the Court of Appeals were wrong in their construction of Section 2 of the Portal-to-Portal Act of 1947, and were wrong in holding that said Act was not applicable to the case at bar.

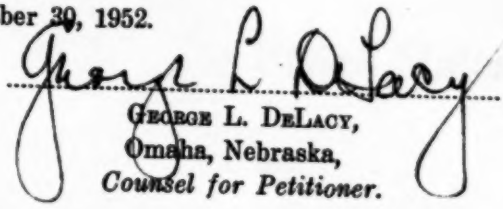
We believe likewise that a reading of said Reply Brief would convince the Court that there was actually a diversity of holdings on the point involved as between the various circuits, and that the Lower Court was likewise of the opinion that there was such a diversity.

CONCLUSION

For the foregoing reason, Petitioner respectfully prays that the order of the Court denying its Petition for a Writ of Certiorari to the Court of Appeals for the Eighth Circuit be re-heard and vacated, and that the Petition be granted, and your Petitioner prays that the said Reply Brief received by the Clerk of the Supreme Court of the United States on the 28th day of October, 1952, be

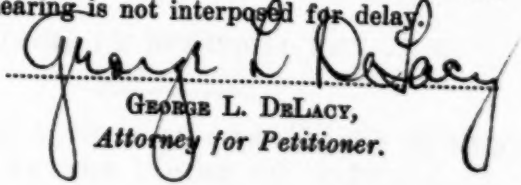
considered by the Court and that it be filed in the office of the Clerk of the Court.

Dated: October 30, 1952.



GEORGE L. DELACY,
Omaha, Nebraska,
Counsel for Petitioner.

The undersigned, G. L. DeLacy, attorney for the Petitioner, hereby certifies that the Petition for Rehearing filed in this cause is presented in good faith, that in his judgment said Petition is restricted to the grounds specified in paragraph 2 of Rule 33 as amended, and that said Petition for Rehearing is not interposed for delay.



GEORGE L. DELACY,
Attorney for Petitioner.